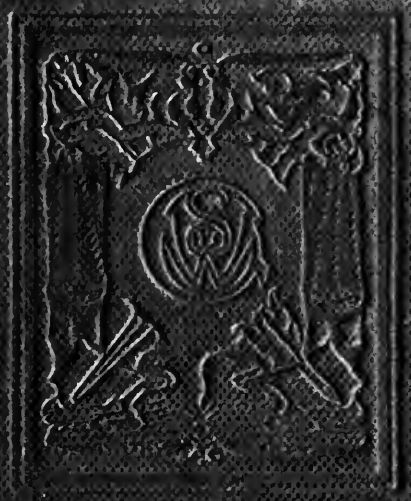

S

& SONS.

in 30 large Volumes. Vols. I. to IX., now

Scotland. By the completed in 13 Vols.

edia of the Laws ring Authorities. In each vol.

To be completed in now ready. *Prospectus*

1900. Seventy-Fifth s. 6d. *nett.*

The Scots Law Times. A Law Newspaper and Reporter. Published every Saturday Morning. Price 6d.

Each number contains—The Decisions of the Week in the Court of Session, Outer and Inner Houses, House of Lords, and Sheriff Courts; A Digest of the Preceding Numbers; Summaries of New Acts of Parliament; News, Articles, and Notes on Legal Subjects of Interest; A Portrait and Biographical Notice of a leading Member of the Profession.

The Juridical Review: Published Quarterly. Subscription, 12s. Vols. I. to XI., in half morocco, price 12s. each.

Burns' Conveyancing Practice, according to the Law of Scotland. By JOHN BURNS, W.S. Royal 8vo. 25s. *nett.* 1899.

Stewart on Diligence. A Treatise on the Law of Diligence. By J. GRAHAM STEWART, M.A., LL.B., Advocate. Royal 8vo. 40s. *nett.* 1898.

Glegg on the Workmen's Compensation Act, 1897. A Commentary. Second Edition. By A. T. GLEGG, Advocate. Royal 8vo. 7s. 6d. *nett.* 1899.

Gloag and Irvine on Rights in Security, Heritable and Moveable, including Cautionary Obligations. By W. M. GLOAG, B.A., Advocate, and J. M. IRVINE, LL.B., Advocate. Royal 8vo. 40s. *nett.* 1897.

Sandeman's Digest of Scots Decisions, 1895–99. Dec in the Supreme Courts of Scotland, and reported in the various Se of Reports. Together with a Table of all Cases which have bee judicially considered during the period. By J. C. S. SANDEMA Advocate. Royal 8vo. With Supplement. 14s. *nett.*

To be continued annually.

Grierson's Stamp Duties. A Treatise on the Law of Stamp Duties on Written Instruments. By P. J. H. GRIERSON, Solicitor to the Inland Revenue. Demy 8vo. 10s. *nett.* 1899.

Scotch Appeal Cases in the House of Lords, 1851 to 1873. With Tables of all the Cases cited, Notes, and Copious Index. Reported by JAMES PATERSON, M.A. 2 vols. Royal 8vo. £5, 5s.

Law Books published by William Green & Sons.

Miller's Law of Nature and Nations in Scotland. A Series of Lectures delivered in Session 1895–96 in the University of Glasgow. By W. Galbraith Miller, M.A., LL.B., Advocate. Demy 8vo. 4s. *nett.* 1896.

Irons' Dean of Guild Court. A Manual of the Law and Practice of, with Synopsis of the Law relating to Building Restrictions, Servitudes, &c. By James Campbell Irons, S.S.C. Demy 8vo. 25s. *nett.* 1895.

Brown's Sale of Goods Act, 1893. Notes and Commentaries on the Sale of Goods Act, 1893. By Professor Richard Brown, Glasgow. Demy 8vo. 16s. *nett.* 1895.

Conveyancing Statutes from the 13th Century to the Present Time, with the Repealed Acts and Portions of Acts distinguished, and the 1863 and 1874 Acts annotated with Cases relating to each Section. Arranged and Edited by John Craigie, M.A., LL.B., Advocate. Royal 8vo. 25s. *nett.* 1895.

Shennan's Parish Councillor's Hand-Book. A Digest of the Local Government (Scotland) Act, 1894 (57 & 58 Vict. cap. 58), with the Text of the Act, and an Account of the Powers and Duties of Parish Councils. By Hay Shennan, Sheriff-Substitute, Lerwick. Fourth Edition. Demy 8vo. 1s. 6d. *nett.* 1895.

Cooper on Defamation. A Handbook of the Law of Defamation and Verbal Injury. By F. T. Cooper, M.A., LL.B., Advocate. Demy 8vo. 14s. *nett.* 1894.

Dewar's Penal Servitude and Prevention of Crimes Acts, 1853-1891. By David Dewar, Chief Constable. Demy 8vo. 5s. *nett.* 1895.

Angus' Dictionary of Crimes and Offences. A Dictionary of Crimes and Offences according to the Law of Scotland, with Appendix relating to Criminal Jurisdiction, Arrest of Offenders, &c. By John W. Angus, Chief Constable, Greenock. Demy 8vo. 12s. *nett.* 1895.

Stewart on Mines and Minerals. A Treatise on the Law of Mines, Quarries, and Minerals in Scotland. By D. Ross Stewart, LL.B., Advocate. Royal 8vo. 30s. *nett.* 1894.

Lorimer's Finance Act, 1894. The New Death Duties imposed by the Finance Act, 1894, with Text, Introduction, and Notes, by J. Campbell Lorimer, Advocate. Demy 8vo. 5s. *nett.* 1894. Supplement to Do. Being the Act of 1896, with Annotations. 2s. 6d. *nett.* 1896.

Doak's Court Procedure. A Manual of Court Procedure, Civil and Criminal. By R. A. Doak, M.A., B.L. Demy 8vo. 5s. *nett.* 1899.

Law Examination Questions. A Handbook for the use of Students preparing for the Examination in Law under the Law-Agents (Scotland) Act, 1873. Compiled by a Law-Agent. Demy 8vo. 5s. *nett.*

ENCYCLOPÆDIA

OF

SCOTS LAW

VOLUME III

PRINTED FOR

WILLIAM GREEN & SONS,

BY MORRISON AND GIBB LIMITED,

December 1896.

AGENTS IN LONDON . . . SWEET & MAXWELL LD.

,, ,, . . . STEVENS & HAYNES.

,, GLASGOW . . . JOHN SMITH & SON

,, AMERICA . . . BOSTON BOOK CO.

GREEN'S ENCYCLOPÆDIA

OF THE

LAW OF SCOTLAND

EDITED BY

JOHN CHISHOLM, M.A., LL.B.

ADVOCATE, AND OF THE MIDDLE TEMPLE BARRISTER-AT-LAW

VOLUME III

CHIEF CONSTABLE TO *CROFT*

EDINBURGH

WILLIAM GREEN & SONS

LAW PUBLISHERS

1896

The Articles in this Volume have been Revised by their respective Authors as at 15*th November* 1896.

THE AUTHORS OF THE PRINCIPAL ARTICLES IN THIS VOLUME ARE AS FOLLOWS:—

Chief Constable.—Alastair Davidson, Advocate.

Child-Murder.—A. M. Anderson, Advocate.

Chiltern Hundreds.—Professor J. Kirkpatrick, Edinburgh University.

Chirographum apud debitorem, etc.; and

Chirographum non extans, etc. — P. J. Hamilton-Grierson, Advocate.

Choosing Curators.—Hay MacWatt, Advocate.

Church.—The Teind Clerk (Nenion Elliot, S.S.C.).

Church Courts.—The Procurator of the Church of Scotland (J. Cheyne, Advocate, Sheriff of Renfrew and Bute), and James Wallace, Advocate, Sheriff of Dumfries and Galloway.

Circuit Courts.—The Clerk of Justiciary (G. L. Crole, Advocate).

Circular Notes.—Allan M'Neill, Solicitor, Bank of Scotland.

Circumvention (Facility and). — William Hunter, Advocate.

Citation.—E. W. Neish, Advocate.

Citation of Jury.—The Clerk of Justiciary (G. L. Crole, Advocate).

Citation on Summary Complaint.—H. H. Brown, Procurator-Fiscal of Morayshire.

Civil Law.—Professor Mackintosh, Edinburgh University.

Civil List. — Professor Kirkpatrick, Edinburgh University.

Civil Process (Abuse of).—A. T. Glegg, Advocate.

Claim.—R. E. M. Smith, Advocate.

Clare constat (Writs and Precepts of). — J. Craigie, Advocate.

Clay.—D. Ross Stewart, Advocate.

Clerical Error.—R. E. Monteith Smith, Advocate.

Clerk of the Crown.—J. H. Stevenson, Advocate.

Clerk of Justiciary.—The Clerk of Justiciary (G. L. Crole, Advocate).

Clerk of the Peace.—Hay MacWatt, Advocate.

Clerk of Session.—R. E. Monteith Smith, Advocate.

Clerk of Teinds.—The Clerk of Teinds (Nenion Elliot, S.S.C.).

Close Time.—C. N. Johnston, Advocate.

Clubs.—A. Orr Deas, Advocate, and J. W. Forbes, Advocate.

Coal Mines Regulation Acts. — Dudley Stuart, Advocate.

Cock-Fighting.—R. T. Younger, Advocate.

Co-Delinquents.—A. T. Glegg, Advocate.

Codex.—Professor Mackintosh, Edinburgh University.

Codicilli.—J. M. Irvine, Advocate, Lecturer on Roman Law, Glasgow University.

Codification.—Eneas J. G. Mackay, Advocate, Sheriff of Fife and Kinross.

Cognate. — A. A. Grainger Stewart, Advocate.

Cognition and Sale.—Hay MacWatt, Advocate.

Coining.—A. M. Anderson, Advocate.

Collateral Security.—W. M. Gloag, Advocate.

Collateral Succession. — W. A. Ramsay, Advocate.

Collation.—Henry Johnston, Advocate, Sheriff of Ross, Cromarty, and Sutherland, and Louis C. Hallard, Advocate.

College of Justice.—Patrick Smith, Advocate.

Collision of Ships.—J. A. Spens, Writer, Glasgow.

Collusion.—F. P. Walton, Advocate.

Comity.—W. Galbraith Miller, Advocate, Lecturer on International Law, Glasgow University.

Commissary Court.—J. S. Taylor Cameron, Advocate.

Commission in the Army.—E. W. Neish, Advocate.

Commission (Proof by).—P. J. Hamilton-Grierson, Advocate.

Commissioner of Police.—J. Campbell Irons, S.S.C.

Commissioner to the General Assembly.—J. H. Stevenson, Advocate.

Constitution, Decree of. — R. E. Monteith Smith, Advocate.

Constitutional Law. — Professor Kirkpatrick, Edinburgh University.

Consul.—Professor Sir Ludovic J. Grant, Bart., Edinburgh University.

Contagious Diseases (Animals). — Dudley Stuart, Advocate.

Contempt of Court.—L. T. Napier, Advocate.

Contexture. — A. A. Grainger Stewart, Advocate.

Contingency of a Process.—J. J. Cook, Advocate, Lecturer on Judicial Procedure, Edinburgh University.

Contingent Debts (in Bankruptcy). — W. J. Cullen, Advocate.

Continuous Voyage; and

Contraband of War. — Professor Sir Ludovic J. Grant, Bart., Edinburgh University.

Contract.—W. Hunter, Advocate.

Contributory.—J. Campbell Lorimer, Advocate.

Contributory Negligence. — A. T. Glegg, Advocate.

Convention of Burghs.—J. Campbell Irons, S.S.C.

Convention of Estates. — Professor Kirkpatrick, Edinburgh University.

Conventional Obligations.—C. Dick Peddie, Advocate.

Convict;

Conviction; and

Conviction (Previous).—A. M. Anderson, Advocate.

Conviction (Summary).—H. H. Brown, Procurator-Fiscal of Morayshire.

Co-Obligant.—F. A. Umpherston, Advocate.

Copies and Extracts.—P. J. Hamilton-Grierson, Advocate.

Copyright (Literary and Artistic).—Alexander Moffatt, Advocate.

Corporation Duty.—The Solicitor of Inland Revenue (P. J. Hamilton-Grierson, Advocate).

Corporeal and Incorporeal; and

Corpus delicti.—R. Scott Brown, Advocate.

Corpus juris. — Professor Mackintosh, Edinburgh University.

Correi debendi.—F. A. Umpherston, Advocate.

Corrupt and Illegal Practices; and

County Council Elections.—Patrick J. Blair, Advocate.

Councillor of a Burgh.—J. Campbell Irons, S.S.C.

County Council. — Alastair Davidson, Advocate.

Court-Martial.—E. W. Neish, Advocate.

Courtesy.—F. P. Walton, Advocate.

Crew.—J. C. S. Sandeman, Advocate.

Crime.—R. W. Renton, Procurator-Fiscal of Fife at Cupar.

Crimen repetundarum. — Professor Mackintosh, Edinburgh University.

Criminal Law Amendment Act.—C. N. Johnston, Advocate.

Criminal Letters.—The Clerk of Justiciary (G. L. Crole, Advocate).

Criminal Prosecution.—(1) Solemn—C. N. Johnston, Advocate-Depute. (2) Summary—H. H. Brown, Procurator-Fiscal of Morayshire.

Crofters' Holdings Acts.—C. N. Johnston, Advocate.

Chief Constable (Burgh).—By the Burgh Police (Scotland) Act, 1892, s. 78, three classes of burghs may appoint a chief constable—(1) Those having a population of not less than 7000, which at the date of the passing of the Act maintained a separate police force. (2) Burghs which at the date of the last census had a population of not less than 20,000; and (3) Any burgh which can prove to the satisfaction of the Sheriff, on the application of the commissioners, that it has a population of not less than 20,000.

Powers and Duties.—The chief constable appoints the constables in the burgh, subject (where a contribution is made from the public funds) to such regulations as may be made by the Secretary for Scotland (Burgh Police Act, 1892, s. 78; Police (Scotland) Act, 1857, c. 72, s. 3). He also directs the distribution of the constables within the burgh, and he may suspend or remove them at pleasure. He has all the powers and privileges which any constable or police officer duly appointed has, by virtue of common law or statute, in the burgh, and in any county in which the burgh is wholly or partially situated, and in any burgh contiguous or adjacent to such burgh, and in any harbour, bay, loch, or anchorage within or adjoining such burgh or county (s. 80). (See CONSTABLE (BURGH.) The chief constable's duty and that of the constables appointed by him is to see to the guarding, patrolling, and watching of the burgh, and to afford assistance in all matters relating to the preservation of peace and good order, the suppression of nuisances, the removal of obstructions within the burgh, the enforcement of byelaws, orders, rules, and regulations made, or to be made, by the commissioners, and to attend the police courts of the burgh. The chief constable may be required to attend at meetings of the commissioners, and to furnish them with all explanations relating to matters falling within his several departments of duty (s. 86). (See CONSTABLE (BURGH).) A chief constable, with the consent of the magistrates, may appoint any constable to act in his stead during any temporary absence or illness, with power to act, in case of his death, until the appointment of his successor; but the commissioners may, if they think fit, supersede any constable so appointed, and may appoint some other person (s. 90). On the requisition of the Sheriff of any county or the chief magistrate of any burgh, the chief constable of any burgh shall, if so directed by the magistrates of the burgh, or, in case of urgency, the

acting chief magistrate, detach constables to act in other counties or burghs. On the order of the Secretary for Scotland, the chief constable of any burgh or county has power to supply a certain portion of the police force, not exceeding ten per cent., for any special or temporary duty elsewhere within Scotland (s. 83). Where the magistrates appoint special constables (s. 96), the roll is kept by the chief constable (s. 97), and they are under his direction, subject to such regulations as the magistrates may make (s. 98).

Appointment.—The appointment of chief constable is made by the commissioners of the burgh, who fix an annual salary. The appointment is made at a regular meeting duly called (*Watson*, 10 S. 481—Competency of vote by ballot). A chief constable is not removable or subject to have his salary diminished by the commissioners, unless with the approbation of the chief magistrate of the burgh and the Sheriff, or, in case of their differing in opinion, of the Secretary for Scotland; but he may be suspended by the magistrates, with the consent of the Sheriff, pending any inquiry instituted with a view to his removal (Burgh Police Act, 1892, s. 78). A chief constable may also be appointed to one or more of the offices of burgh prosecutor, burgh surveyor, inspector of cleansing, inspector of lighting, sanitary inspector, and firemaster. He may also be appointed chief constable for two or more adjoining burghs, whether situated in one or more counties, if the commissioners of such burghs agree to join in such appointment; and the chief constable of a burgh may, if the commissioners agree to join in such appointment, be appointed by the standing joint-committee of the county chief constable of the county in which such burgh is wholly or partially situated, or of any county closely adjacent (Burgh Police Act, 1892, s. 78; Police Act, 1857, s. 61). A chief constable, when appointed, makes the following declaration:—"I hereby do solemnly, sincerely, and truly declare and affirm that I will faithfully discharge the duties of the office of constable" (Burgh Police Act, 1892, s. 79). For pension provision (53 & 54 Vict. c. 67), and rewards for meritorious service (Burgh Police (Scotland) Act, 1892, s. 89), see CONSTABLE.—[Irons, *Burgh Police Act*, p. 136.]

Chief Constable (County).—The chief constable of a county, subject to the approval of the standing joint-committee, appoints the other constables for the county, and a superintendent to be at the head of the constables in each division of the county. He may dismiss all or any of them, and he has the general disposition and government of all the constables so appointed (Police (Scotland) Act, 1857, s. 62). As to a chief constable's liability for acts done in his official capacity (*Melvin*, 1847, 9 D. 1129; *Pringle*, 1867, 5 Macq. (H. L.) 55; *Brown*, 1874, 1 R. 776) see CONSTABLE. In the case of burghs policed by the county, the chief constable of the county appoints county constables for the burgh, and one of them to act as chief officer of police in the burgh, subject to his orders. The chief constable has all the powers in the burgh of a chief constable appointed by the commissioners under the Burgh Police (Scotland) Act, 1892. (See CHIEF CONSTABLE (BURGH)); Burgh Police (Scotland) Act, 1892, s. 81.) The chief constable is subject to the lawful orders of the Sheriff, or of the justices of the peace in general or quarter sessions assembled, and to the rules established for the government of the police force. Where conflicting orders are issued by the Sheriff and the justices of the peace, the orders of the Sheriff must be followed until the Secretary

for Scotland has given a decision (Police (Scotland) Act, 1857, s. 6). A chief constable has the powers and privileges which any constable has by virtue of common law or statute throughout the county (including burghs comprised in the county), and in any harbour, bay, loch, or anchorage within or adjoining the county; also he has these powers within an adjoining county (Police (Scotland) Act, 1857, s. 11). A chief constable has no power, without the authority of a magistrate, to convey a prisoner to a place beyond the bounds in which he is entitled to act (*Hollands*, 1843, 5 D. 1352). With the approval of the Sheriff or of the justices of the peace in general or quarter sessions assembled, on application made to him by any person, the chief constable may appoint additional constables, at the expense of the person applying (Police (Scotland) Act, 1857, s. 7); and he may be directed to appoint additional constables to protect works in progress in a district (21 & 22 Vict. c. 65, s. 2). On the application of the commissioners of a burgh, a county chief constable, with the consent of the standing joint-committee, may detach constables to act in the burgh temporarily (Burgh Police (Scotland) Act, 1892, s. 82). On requisition by the Sheriff of any county or the chief magistrate of a burgh, or, in case of urgency, the chairman of the standing joint-committee, a chief constable shall, if so directed by the standing joint-committee, detach constables to act in counties or burghs. On the order of the Secretary for Scotland, the chief constable of any county has power to supply a certain portion of the police force, not exceeding ten per cent., for any special or temporary duty elsewhere within Scotland (Burgh Police (Scotland) Act, 1892, s. 83). When required, he must make report of all matters concerning the police of the county or burgh to the standing joint-committee, justices of the peace, and magistrates of burghs forming part of the county for police purposes (Police (Scotland) Act, 1857, s. 26). Subject to the approval of the standing joint-committee, a chief constable may appoint a deputy, in case of his being incapable from illness, or necessary absence from the county, to perform his duties. In case of a vacancy in the office of chief constable, a deputy may be appointed. Where a deputy is appointed, he has all the powers, privileges, and duties of the chief constable, but he cannot act during any vacancy for more than three months (Police (Scotland) Act, 1857, s. 10). Where the police establishments of county and burgh are consolidated, the chief constable of the county has the general disposition and government of all the constables, and at his pleasure he may dismiss all or any of them, but he must report the fact, with his reasons for dismissal, to the chief magistrate. No burgh constable who is dismissed by the chief constable can be reappointed for the same burgh without the consent of the chief constable, and no constable can be dismissed by the burgh police authority during the time that any agreement for consolidation is in force (Police (Scotland) Act, 1857, s. 62). The chief constable of a county, or any superintendent of a division of a county, may, if the standing joint-committee of the county agree to join in such appointment, be appointed chief constable of any burgh situated within or closely adjacent to such county or division of a county. The chief constable of a county may, with the sanction of the standing joint-committee, appoint the chief constable of any burgh, situated within or closely adjacent to any division of the county, to be superintendent at the head of the constables of such division of the county, if the commissioners of the burgh agree to the appointment (Burgh Police (Scotland) Act, 1892, s. 78). Penalties provided by the Police (Scotland) Act, 1857, may be recovered by complaint by *inter alios* the chief constable (Police (Scotland) Act, 1857, s. 68).

Appointment.—The standing joint-committee, which takes the place of the police committee, appoints the chief constable of a county (Police (Scotland) Act, 1857, s. 3; Local Government (Scotland) Act, 1889, s. 18 (5)). The appointment is made at a meeting specially called, on not less than ten or more than twenty days' notice, or at any adjournment of said meeting, and is subject to the approval of the Secretary for Scotland, and to the rules and regulations which have been laid down under the Police Act. The appointment may be made for two or more adjoining counties, if the standing joint-committees of such counties agree to join in such appointment (Police (Scotland) Act, 1857, s. 4). On first appointment, a chief constable must not exceed forty-five years of age (53 & 54 Vict. c. 67, s. 24), and when appointed he holds office until dismissed by the standing joint-committee. His salary is fixed by the standing joint-committee, but subject to the rules laid down by the Secretary for Scotland (Police (Scotland) Act, 1857, ss. 1, 3). On appointment, he takes the following oath before a Sheriff or any justice of the peace for the county:—"I hereby swear that I will faithfully discharge the duties of constable" (Police (Scotland) Act, 1857, s. 10). For provisions as to pension (53 & 54 Vict. c. 67), see CONSTABLE.

Child-Murder.—There is no difference in degree between the murder of a child and the murder of an adult. In both cases, if the guilt of the panel is established, the punishment is death. If the child is not completely born, the destruction of it, though criminal, is not homicide (Hume, i. 186; Alison, i. 71; Macdonald, 120; *Macallum*, 1858, 3 Irv. 187). If, however, the child has breathed, it is homicide if it is killed, although the killing has taken place before the child is completely out of the body of the mother (*Scott*, 1892, 3 White, 240).

The panel in a child-murder trial is, in the majority of cases, the mother of the child which had been born illegitimate. The shame of her position not infrequently leads the mother of a bastard to lay violent hands on her offspring. The mode in which the destruction of the child has been accomplished frequently determines whether the crime amounts to murder or is only culpable homicide. If the accused deliberately exposes her child in a remote spot, where it is unlikely to be found while in life, and the child dies from the exposure, the crime undoubtedly amounts to murder. On the other hand, if the child is placed at the side of a frequented road, where it is likely to be found while alive, no higher crime than culpable homicide is committed if the child perishes from the exposure.

Other circumstances may point more clearly to the absence of that wilfulness or recklessness which characterises the crime of murder. Thus it is only culpable homicide if the child is suffocated at its birth, through the mother making no preparations for, and calling for no assistance at the birth, although she did not conceal the fact that she was pregnant (*Martin*, 1877, 2 Coup. 379; *Scott*, *ut supra*). In another case a verdict of culpable homicide was returned, where the accused had carelessly folded up a bed in which a child was lying, and caused its death, although the jury affirmed that she did not know, when she folded up the bed, that the child was in it (*Sutherland*, 1856, 2 Irv. 455).

An important consideration, as bearing upon the quality of the crime committed, is the state of the panel's mind at the time of the child's death. In the case of *Abercrombie* (33 S. L. R. 581), where a woman was indicted

for the murder of her illegitimate child, by choking it immediately after its birth, Lord M'Laren, in charging the jury, said, "It is of course a characteristic of every case of confinement, and I suppose in a special degree of the first confinement of a woman, that it is a period of very acute suffering, and you will have to consider this case not only in a question of guilty or not guilty, but the question also arises whether this is to be treated as a case of murder or of culpable homicide. It is a perfectly legitimate topic of consideration that, according to the evidence, the act was done immediately after delivery, and apparently without premeditation, at a time when the woman would be experiencing acute physical suffering, when she was alone and without assistance, and had apprehensions as to the disclosure of her condition; and that she may have been guilty of an attack upon the person of her child, which was illegal and criminal, and yet may have done so without realising an intention of taking the life of the child."

In the seventeenth century the crime of child-murder was so common, and the difficulties of proving the crime were so great, that the legislature, by the Act 1690, c. 21, introduced a statutory persumption of child-murder when certain *indicia* were present. These *indicia* were—that the woman concealed her pregnancy during the whole period thereof, that she did not call for help to her delivery, and that the child has been found dead, or is missing. If these circumstances were proved to the jury, they were bound to convict of murder. This harsh Statute was repealed in 1809 by the Act 49 Geo. III. c. 14 (see CONCEALMENT OF PREGNANCY).—[Hume, i. 186, 189, 237, 291, 298; Alison, i. 71, 72; More, ii. 360; Macdonald, 133, 138, 173.] See EXPOSURE OF CHILDREN; CULPABLE HOMICIDE; MURDER.

Child-stealing.—See PLAGIUM.

Child-stripping.—See THEFT.

Children.—See PARENT AND CHILD; CUSTODY OF CHILDREN; BASTARD; LEGITIMACY; SUCCESSION; VESTING; CONDITIO SI SINE LIBERIS; LEGITIM; PUPIL; MINOR; AGE; TUTORY; CURATORY; CONTRIBUTORY NEGLIGENCE; CRIME; WITNESS; CRUELTY TO CHILDREN.

Chiltern Hundreds.—Through Wiltshire, Berkshire, Oxfordshire, and Buckinghamshire run the Chiltern Hills, once densely wooded with beeches and infested with robbers. Government used accordingly to appoint stewards or bailiffs of the Chiltern Hundreds for the protection of the inhabitants, but the forest and its dangers have long since disappeared. The office, however, still survives in name, being in the gift of the Chancellor of the Exchequer, with nominal emoluments of twenty shillings a year and sundry fees. The still surviving hundreds are those of Stoke, Burnham, and Desborough, in Buckinghamshire, while the royal manors of East Hendred (Berks), Northstead, Hempholme (Yorkshire), and Poynings (Sussex) have similar sinecure stewardships. When a member of the House of Commons desires to resign his seat, which he cannot legally do, he applies (and this custom dates from about 1750) for one of these stewardships, to which he is appointed almost as a matter of course: and by his acceptance of this office

of emolument under the Crown he vacates his seat. When this fictitious proceeding is adopted during recess, it may have one very anomalous result. As the Speaker has no power to issue a new writ for the seat thus rendered vacant (such power being given him by Statute in the case of seats vacated through other appointments), the steward is at once qualified for election elsewhere, while his original seat must remain vacant till the end of the recess. It is one of the benefits of the Union, that Scottish members of the House are eligible for these English stewardships; whence the mention of the subject in the present work.—[May, *Parliamentary Practice*; Wharton, *Law Dictionary*, etc.]

Chimney-sweepers.—Various Statutes have been passed for the protection of chimney-sweepers and their apprentices, the principal Act being 3 & 4 Vict. c. 85. By sec. 2, "any person who shall compel or knowingly allow any child or young person under the age of twenty-one years to ascend or descend a chimney, or enter a flue, for the purpose of sweeping, cleaning, or coring the same, or for extinguishing fire therein, shall be liable to a penalty not more than ten pounds [or less than five pounds]." The last five words within brackets are repealed by a later Statute. No child under sixteen years may be apprenticed to a chimney-sweeper (s. 3). These provisions were extended by a later Statute (27 & 28 Vict. c. 37), which restricted the employment of children under ten, and made it illegal for such to assist a chimney-sweeper in his trade or business outside of his house or place of business, or the yard or buildings connected therewith (s. 6). By sec. 7 of this later Act, a chimney-sweeper entering a house or building to sweep chimneys, etc., is not allowed to bring with him persons under sixteen years of age.

For either of these offences a penalty not exceeding ten pounds may be inflicted (s. 8).

By the principal Act (3 & 4 Vict. c. 85) certain procedure is provided, by which, after application by an apprentice to any justice of the peace having jurisdiction over the master's place of residence, such apprentice may be discharged (s. 4). By sec. 6, "for the better security from accidents by fire or otherwise," provision is made for the improved construction of chimneys and flues, and regulations are laid down to be observed in the building of such, and in the material to be used. So the Act requires all withs and partitions to be of brick or stone, and at least equal to half a brick in thickness; and chimneys or flues built "in any wall, or of greater length than four feet out of the wall, not being a circular chimney or flue twelve inches in diameter," must not be, in every section, less than fourteen inches by nine inches. Further, no chimney or flue is to be erected at a greater obtuse angle than 120 degrees, with this exception, that "chimneys or flues may be built at angles with each other of 90 degrees and more, such chimneys or flues having therein proper doors or openings not less than six inches square." Every master or other master workman committing a breach of these regulations is liable in a penalty of not less than £10, nor exceeding £50. All convictions for penalties may be had before two or more justices or the Sheriff of the county where the offence is committed, and such penalties are to be levied, with costs and charges, by distress of goods and chattels, on conviction by confession, or proof by one or more witnesses. One-half of the penalty and costs is payable to the informer, and one-half to the poor of the parish (s. 7). In default of payment, the party convicted may be sent to prison for a period not exceeding two months, with or with-

out hard labour (s. 8). No conviction can be quashed for want of form (s. 12). It has further to be noted that by sec. 9 of the amending Act (27 & 28 Vict. c. 37), where a person is convicted of an offence under sec. 2 of the principal Act above quoted, power is given, in lieu of a fine, to impose imprisonment for a term not exceeding six months, with or without hard labour; and by sec. 10, where the age of any person comes in question, the burden of proof of such age is laid upon the defendant or respondent, *i.e.* the master.

In 1875 an Act was passed making it compulsory for all chimney-sweepers in England to have a certificate. This Act does not extend to Scotland; but by 55 & 56 Vict. c. 55, s. 275, the magistrates in burghs in Scotland may cause chimney-sweepers to be licensed. In Edinburgh and Glasgow and other large towns, the magistrates already have this power under their special Police Acts, and there it is necessary, under pain of certain penalties, for any person wishing to carry on the trade or business of a chimney-sweeper, to obtain a licence.—[See Chisholm, *Barclay's Digest*, *s.v.* Chimney-sweepers; and for list of convictions, see Stone, *Justices' Manual*, 28th ed., 227.]

Chirographum apud debitorem repertum presumitur solutum.—When a deed of obligation is found in the granter's possession, it is presumed that the obligation has been implemented or discharged. The presumption is very strong in the case of documents which are frequently discharged by redelivery; *e.g.* bills (*Campbell*, 1728, Mor. 11434; *Cumming*, 1861, 23 D. 1365) and personal bonds (*Monkton*, 1623, Mor. 11404; *Gordon*, 1703, Mor. 11408). It has also been held to apply to a heritable bond perfected by sasine (*Rollo*, 1710, Mor. 11411), to a trust deed found in the trustee's repositories after his death (*Charteris*, 1712, Mor. 11413), and where the cautioner in a bond (*Monkton*, *Gordon*, *ut supra*), and the creditor in an assignation (*Fairly*, 1666, Mor. 12278), had possession of the deed. The presumption does not apply to cases in which it is the practice to use a deed of retrocession (*Gordon*, 1684, Mor. 11406, 16181; 2 Bro. Supp. 57), or to bilateral deeds (*Stewart*, 1677, Mor. 11406; Dickson, *Evidence*, s. 925), or where the creditor holds a deed which recognises the subsistence of the debt, *e.g.* a bond of corroboration (*M'Gowan*, 1703, Mor. 11407). The presumption can be redargued only by the granter's writ or oath, save where force or fraud is alleged (*Edward*, 1823, 2 S. 431; *Knox*, 1862, 24 D. 1088), or where the special facts of the case relative to possession by the granter, as admitted or explained by him, are such as to render it desirable for the ends of justice that the inquiry should not be limited to his writ or oath (see *Ferguson, Davidson, & Co.*, 1880, 7 R. 500; *Henry*, 1884, 11 R. 713). [Stair, i. 7. 14; i. 18. 3; iv. 32. 3; iv. 45. 24; Ersk. iii. 4, 5; More's *Notes*, 126; Dickson, *Evidence*, ss. 173, 174, 932–5; Bell's *Prin.* s. 566; Kirkpatrick, *Digest of Evidence*, ss. 114, 134, 145, 157.] See Delivery; Payment.

Chirographum non extans presumitur solutum.—When the creditor in a written obligation cannot produce the document of debt, the presumption is that the debt has been discharged (*Swinton*, 1679, 2 Bro. Supp. 246; cf. *Ryrie*, 1840, 2 D. 1210). The effect of the presumption is, not to impair the subsistence of the debt, but to deprive the creditor of a ground of action (*Goldie*, 1737; Elch. *voce* "Pre-

sumption," No. 9); and, in order to rebut it, an action of proving the tenor is in general necessary (see ADMINICLES; CASUS AMISSIONIS; PROVING OF THE TENOR; cf. *Ryrie, ut supra*).—[Dickson, *Evidence*, ss. 175–6.]

Choosing Curators.—Where a father has not nominated curators to a minor in his testament, or where the curators nominated have not accepted, or, having accepted, have failed (*Bruce*, 1854, 17 D. 265, L. Curriehill), the minor, having attained puberty, has the right to choose curators (Act 1555, c. 53). The right is not excluded by the nomination of curators by any other person than the father (*Scott*, 1675, Mor. 16291).

Form of Action.—The proceedings may be raised by the minor either in the Sheriff Court to whose jurisdiction he may be subject by residence, if his next of kin are not resident abroad, or in the Court of Session. In the latter case they begin by summons, and in the former by an edict of curatory. The conclusions of the edict or the summons are, that in terms of the Statute 1555, c. 35 (and also 1672, c. 2, if it is desired to conjoin conclusions for making up curatorial inventories, as is usually done), the person nominated and chosen by the minor should be ordained to be curator to him during the period of his minority, and that the defenders, as nearest of kin, and all others having interest, should be summoned to appear to hear and see the curator chosen by the minor, and authorised by the Court to manage the estate of the minor, with the usual powers, and (if it is desired to make up inventories) to concur with the curator in making up inventories of the minor's estate, heritable and moveable, and to subscribe three copies thereof, and to see caution received from the curator; with certification that, if they fail, such person will be deemed and authorised to be curator to the minor as shall be nominated and chosen by him, and the Court will concur, or delegate some proper person to concur, with the curator in making up inventories (*Juridical Styles*, iii. 206; Lees, *Sheriff Court Styles*, 147).

The Defenders.—Although the Act of 1555 required only "twa of the minor's kin" to be defenders, in practice two of the nearest of kin on the father's side, and two on the mother's side, must be cited, as in the case of proceedings under the Act 1672, c. 2 (*Wallace*, 1674, Mor. 16290), for making up inventories. Where the nearest of kin are themselves to be nominated, the next after them are cited instead. Where the nearest of kin are furth of Scotland, although other kin are resident in Scotland, the usual and proper procedure is to petition a Division of the Court of Session (*De Maria*, 1831, 3 Sc. Jur. 536), by printed petition (*Duthie*, 1854, 17 D. 143; *Juridical Styles*, iii. 777), to dispense with citation of the nearest of kin, after which the action proceeds against the nearest of kin after them resident in Scotland (*Buchan's Tutors*, 1873, 11 M. 662; *M'Clement*, 1867, 5 M. 944). Where the minor, or his father, is illegitimate, the citation of the paternal next of kin is craved to be dispensed with (*Wilson*, 1859, 21 D. 736; see also *Kyle*, 1861, 23 D. 1104, where the next of kin of the mother of a bastard were furth of Scotland).

Procedure.—After the ordinary procedure of calling the summons, etc., the minor either personally chooses his curators, signing a minute to that effect, or, as is now the usual course, lodges a tested deed of nomination, signed by him, with a minute craving the judge to admit the nomination. If reasonable grounds be stated for suspecting that the minor's choice may be unduly influenced, he may be sequestered for some time prior to choosing (Fraser, *P. & C.* 360). It has been settled that, though the minor declares that the curators shall not be liable in omissions nor *singuli*

in solidum, and gives other privileges restricting the rules of the common law, all such privileges are *ultra vires* (*Watson*, 1773, Mor. 16369; Ersk. i. 7. 27). He may, however, regulate the form of appointment by making the nomination joint, or with a *sine quo non*, or a quorum (Fraser, *P. & C.* 358). The curators may accept office (1) by appearing in Court, signing a minute of acceptance, and taking the oath; or (2) by accepting and taking the oath before the Sheriff, or any justice of the peace, to whom commission is generally granted for that purpose. The subsequent procedure deals with the finding of caution and making up of curatorial inventories. See CURATOR.

Persons who may be Chosen.—The minor may choose as curator any person (even his mother—*Johnstone*, 1550, Mor. 16222) major and resident in Scotland,—but not a married woman (*Montrose*, 1695, 4 Bro. Supp. 277). It appears to be in the discretion of the judge to sanction the nomination of a person even resident furth of Scotland, if he sign a minute obliging himself to carry out the orders of the Court, and prorogating the jurisdiction (*L. Macdonald*, 1864, 2 M. 1194; *Fergusson*, 1870, 8 M. 426; Mackay, *Practice*, ii. 296, n. (*e*)). No second nomination is competent to the minor, unless the curators chosen die, or are removed, or resign with permission of the Court (*A.*, 1545, Mor. 16221; *Adam*, 1627, Mor. 16247).

The somewhat cumbrous procedure of choosing curators is in great measure superseded in practice, by the more convenient petition to the Junior Lord Ordinary for the appointment of a *curator bonis* to the minor, usually combined with a crave for a factor *loco tutoris* where the family includes both pupils and minors. A similar course would probably now be followed where there are no relations on the father's or mother's side, or if they are out of the country, and in several other cases where *necessity* is the ground for the application (*Towton*, 1847, 10 D. 225; *Webster*, 1849, 12 D. 912; cf. *Macarthur*, 1854, 26 Sc. Jurist, 48–9, and *Barron*, 1854, 17 D. 61; see Fraser, *P. & C.* 459-60; Thoms on *Judicial Factors*, 254 *et seq.*). Further, it may be noted that the Judicial Factors (Scotland) Act, 1889, provides, by sec. 11, that where the estate of a pupil has, up to the date of his becoming a minor, been administered by a factor *loco tutoris*, the factor shall *ipso facto* become *curator bonis* to the minor, without any new application to the Court, and shall administer the estate until the minor shall choose curators or attain majority. But the consent of the minor must be obtained before the Court can appoint a *curator bonis* (*Wood*, 1849, 11 D. 1494; *Accountant of Court*, 1854, 16 D. 717); and so in *Macdonald* (1896, 4 S. L. T., No. 4), Lord Kyllachy refused, in the face of opposition by the minors resident in America, who could choose curators if they pleased, to appoint a *curator bonis* on a petition presented by a cousin, which stated that the minors had certain interests in the residue of a trust estate about to be divided, and that there was no person in Scotland legally entitled to receive the shares of the minors, or to give a valid discharge.

[Fraser, *P. & C.* 354 *et seq.* and 458 *et seq.*; Mackay, *Practice*, ii. 293, *Manual*, 495; Coldstream, *Procedure*, 31; Balfour, *Handbook of Practice*, 142.]

See CURATOR; GUARDIANSHIP OF INFANTS ACT.

Christmas Day.—See HOLIDAYS.

Christmas Recess.—By the Court of Session Act, 1868, s. 4, it is provided that it is lawful for the Court, at the time of the Christmas

recess, to adjourn for a period not exceeding fourteen days. During this recess a day is appointed for boxing papers. See BOXING; BOX-DAYS.

Church.—The introduction of Christianity into Scotland has been attributed to the arrival of St. Ninian from Rome about the year 397, from which time the Church slowly took its rise. It was first called "The Scottish Church" about 878–89 (Dr. Campbell in *Church of Scotland, Past and Present*, edited by Prof. Story, i. 238). The Church had a measure of independence, sometimes successfully resisting the orders of the Pope. But the clergy were not permitted to escape from the assessment under Boidmonts Roll in 1275, which was ordered by Pope Gregory X. for the relief of the Holy Land (Hailes, *Annals*, Edn. 1797, i. 199). Dealings with Rome were sometimes prohibited by Act of Parliament (see Thomson, *Acts*, *voce* Church); and Forbes states (132) that after the Pope had begun to claim first-fruits, "they could not be exacted in Scotland without the king's consent, who got the fifth penny." The Scottish clergy prepared canons for the regulation of their affairs, which continued in force till after the Reformation (see Hailes, iii. 145 and 198). The canons, so far as now extant, have been carefully edited by Dr. Joseph Robertson (see *Statuta Ecclesiæ Scoticanæ*; see also Church in Skene's *Celtic Scotland*, ii.).

The causes which led to the Reformation need not here be traced. In 1560 the Lords of the Congregation passed an Act abolishing the authority and jurisdiction of the Pope (Thomson, *Acts*, ii. 526). That Act, against which several defects have been alleged, was confirmed by various Acts passed in 1567, and Presbytery then became the form of Church government in Scotland. The superintendents employed had not episcopal authority.

The Church continued Presbyterian till 1584, when Episcopacy was established by what have been popularly called "The Black Acts" of that year. Presbytery was, however, again restored by Act 1592, c. 116 (Thomson, c. 8), often referred to by Presbyterians as "The Charter of the Church." When the Act of 1587 was passed, King James VI. had meditated the continuance of Episcopacy (Kames, *Statute Law*, 432); and though interrupted in 1592, he succeeded in having bishops restored in 1606, after his accession to the English throne. Bishops held office in the Church from that time till 1637, when Episcopacy was again interrupted. The Church continued Presbyterian during the remainder of the reign of King Charles I., and throughout the Commonwealth. After the restoration of King Charles II., Episcopacy was restored in 1662, and had an unpopular existence till after the Revolution Settlement of 1688, when, in accordance with a Claim of Right passed by the Estates, 11th April 1689, Presbytery was restored by the Act 1690, c. 5, which ratified the Act 1592, except as regards patronage. Before the union with England, an Act of security for the maintenance of the Presbyterian Church was passed in the Scottish Parliament, 1707, c. 7; and that Act was afterwards ratified by Act of the English Parliament, 6 Anne, c. 11, s. 2, which declared that "the establishment therein contained shall be held and observed in all time coming as a fundamental and essential condition of any treaty or union to be concluded betwixt the two kingdoms." The Belhaven Act (26 & 27 Vict. c. 47) has since conferred certain special powers for administrative purposes on the Presbyterian Church.

Patronage, which had been in existence at the Reformation (Forbes, 57), continued, with some interruptions, after it, and was the fruitful source of

trouble and secession, including the great secession of 1843 (see *Stewarton* case, 20 Jan. 1843, and authorities referred to in that volume). When patronage was temporarily abolished by Act 1690, c. 23, patrons were granted certain teinds, *i.e.* they were made titulars *qua* patrons, as had been done by the Act 1649, c. 39; but when patronage was restored in 1711, patrons were left in possession of both teinds and patronage (see TEINDS). Patronage was not got rid of till 1874, when it was abolished on certain terms (Act 37 & 38 Vict. c. 82). The appointment of ministers to vacant churches and parishes is now made by the people, under Regulations of the General Assembly.

Church Courts.—The constitution and powers of the Courts of the Church of Scotland are founded upon the Act of 1592, which established the Church with its Presbyterian form of Church government. The Act ratified all liberties and privileges previously granted to the Church, and confirmed all Acts of Parliament in its favour, and it then proceeds to declare as follows:—"And sielyk ratifies and apprevis the Generall Assemblies appointed be the said Kirk, and declairis, that it sall be lauchfull to the Kirk and ministrie everilk yeir, at the leist, and ofter *pro re nata*, as occasioun and necessitie sall require, to hald and keip Generall Assemblies: Providing that the Kingis Majestie, or his Commissioner with thame to be appoyntit be his Hienes, be present at ilk Generall Assemblie, befoir the dissolving thairof, nominat and appoynt tyme and place quhen and quhair the nixt General Assemblie salbe haldin; and in caiss nather his Majestie, nor his said Commissioner, beis present for the tyme in that toun quhair the Generall Assemblie beis halden, then and, in that caiss, it salbe lesum to the said Generall Assemblie, be themselflis, to nominat and appoynt tyme and place quhair the nixt Generall Assemblie of the Kirk salbe keipit and haldin, as they haif bene in use to do thir tymes bypast; And als ratifies and apprevis the Sinodall and Provinciall Assemblies, to be haldin be the said Kirk and Ministrie, twyis ilk yeir, as they haif been, and ar presentlie in use to do, within every Province of this realme; And ratifeis and apprevis the Presbiteries and particulare Sessionis, appoyntit be the said Kirk, with the haill jurisdictioun and discipline of the same Kirk, aggreit upon be his Majestie, in Conference had be his Hienes with certane of the Ministrie, convenit to that effect, of the quhilkis articles the tenour followis: Materis to be intreatet in Provinciall Assemblies: Thir Assemblies ar constitute for wechtie materis, necessar to be intreatit be mutuall consent, and assistance of brethrene, within the Province, as neid requyris. This Assemblie hes power to handle, ordour and redresse, all things omittit or done amiss in the particulare Assemblies. It hes power to depose the office beraris of that Province, for gude and just causeis, deserving deprivatioun: And generallie, thir Assemblies hes the haill power of the particulare Elderscippis quhairof they ar collectit. Materis to be intreatit in the Presbiteries, the power of the Presbiteries is to give diligent labouris in the boundis committit to their chairge, that the kirkis be kepit in good ordour, to enquire diligentlie of naughtie and ungodlie personis, and to travell to bring thame in the way agane be admonitioun, or threatening of Goddis jugementis, or be correctioun. It appertenis to the Elderschip, to tak heid that the word of God be puirlie preachit within thair boundis, the Sacramentis richtlie ministrat, the Discipline intertenyit, and the ecclesiasticall guidis un-

corruptlie distributit. It belangis to this kind of Assembleis, to caus the ordinances maid be the Assemblies, Provinciallis, Nationallis, and Generallis, to be kepit and put in executioun, to mak constitutiounis quhilkis concernis το πρεπον in the Kirk, for decent ordour, in the particulare Kirk quhair they governe: Provyding that they alter na rewlis maid be the Provinciall or Generall Assemblies; and that they mak the Provincinall Assemblies forsaidis privie of the rewlis that they sall mak, and to abolish constitutionis tending to the hurte of the same: It hes power to excommunicat the obstinat, formale process being led, and dew intervall of tymes observit. Anent particulare Kirkis, Gif they be lawfully rewlit be sufficient ministeris and sessioun, Thay haif power and jurisdictioun in thair awin Congregatioun, in materis ecclesiasticall. And decernis and declaris the saidis Assemblies, Presbiteries and Sessiounes, Jurisdictioune and Dicipline thairof foirsaid, to be in all tymes cuming, maist just, gude and godlie in theselff, notwithstanding of quhatsumevir Statutis, Actis, Canon, Civile or Municipall Lawes, maid in the contrair; to the quhilkis and every ane of thame, this presentis sall mak express dirogatioun."

This Act of the Scottish Parliament, which may be regarded as the Charter of the Church of Scotland, was confirmed at the Revolution Settlement by the Act 1690, c. 7, which was itself ratified by the Act of Security, which latter Act is inserted verbatim in the Treaty of Union with England in 1707, and declared to be "a fundamental and essential condition" of the Union in all time coming. In further security of the rights and privileges thus conferred upon the Church, the sovereigns of Great Britain, at their accession to the throne, take an oath that they will inviolably maintain the government, worship, discipline, rights, and privileges of the Church as laid down in these solemn statutory enactments.

The Church Courts are accordingly possessed of a statutory jurisdiction, in matters spiritual and ecclesiastical, which is quite independent of the Civil Courts of the realm; and with which, so long as they confine themselves to matters falling within the sphere of their exclusive jurisdiction, the Civil Courts will in no way interfere. In this sphere they are supreme, just as the Court of Session and the High Court of Justiciary are supreme within their respective jurisdictions. This has been the subject of frequent decision, and may be held as settled law. In *Lockhart* v. *Presbytery of Deer*, 5 July 1851, 13 D. 1296, a minister, who had been deposed by the General Assembly on the ground of immoral conduct, presented a note of suspension of the sentence in the Court of Session, on the grounds that the libel on which the sentence proceeded was defective in the instance, that evidence had been improperly rejected, and that the procedure before the Presbytery had been irregular and oppressive. The Court held that the offences were proper for the cognisance of the Church Court, and that that being so, the Civil Court had no right either to control the Church Courts in their procedure, or to review the sentence on its merits. The judgment of Lord President Boyle contains the following passage, which precisely states the law on the subject:—"Although we may form a different opinion in regard to matter of form, or even of substantial justice, in my opinion we cannot interfere to quash the sentence. . . . We have just as little right to interfere with the procedure of the Church Courts in matters of ecclesiastical discipline as we have to interfere with the proceedings of the Court of Justiciary in a criminal question." So too in *Wight* v. *Presbytery of Dunkeld*, 29 June 1870, 8 M. 921, where a minister presented a note of suspension of a judgment of the General Assembly, complaining of the

procedure in the Church Courts, Lord Justice-Clerk Moncreiff thus laid down the law relating to the jurisdiction of the Church Courts:—"The jurisdiction of the Church Courts, as recognised judicatories of this realm, rests on a similar statutory foundation to that under which we administer justice within these walls. It is easy to suggest extravagant instances of excess of power; but quite as easy to do so in regard to the one jurisdiction as to the other. Within their spiritual province the Church Courts are as supreme as we are within the civil; and as this is a matter relating to the discipline of the Church, and solely within the cognisance of the Church Courts, I think we have no power whatever to interfere."

It has been decided that no action of damages will lie against a Church Court of the Established Church for any sentence or judgment pronounced in a proper case of discipline duly brought before them, regularly conducted, and within their competency and province as a Church Court, even though it be averred that the judgment was pronounced maliciously and without probable cause; but this will not apply to a sentence or judgment of a Church Court which is beyond its jurisdiction, or whereby it refuses to exercise powers conferred upon it by law. In such a case it would be open to the Civil Court to reduce the sentence and award damages to the aggrieved person (*Sturrock*, 3 July 1849, 11 D. 1220).

The assistance of the Sheriff as Judge Ordinary may be obtained by the Church Courts for the purpose of citing witnesses to attend and give evidence, where they have failed to obey the citation of the Church Courts. Cf. Ld. P. Inglis in *Presbytery of Lews* v. *Fraser*, 16 May 1874, 1 R. 888: "Whenever the Church Courts are unable of themselves to carry out their own orders made to explicate their own jurisdiction, the Civil Courts are bound to step in and give 'all due assistance.'"

By the Church Patronage Act, 1874 (37 & 38 Vict. c. 82), the right of electing and appointing ministers is vested in the congregations of the Church, and the Church Courts are "declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement" of the minister; but it is provided that if no appointment shall be made by the congregation within six months, the right of appointment shall accrue to the Presbytery *tanquam jure devoluto*. Shortly after the passing of the Act, the question was raised whether it was within the province of the Church Courts or the Civil Courts to decide whether, in any particular case, the right of appointment had accrued to the Presbytery, or still belonged to the congregation, and it was held that the rights of the congregation and those of the Presbytery, being legal rights depending upon Statute, their enforcement or a challenge of their validity in any particular case could only be tried in the tribunal appointed to interpret the Statutes of the realm, that is, the Supreme Civil Court, unless the Legislature had in very clear terms conferred the jurisdiction upon another tribunal, which, having regard to the terms of the Statute, had not been done. To the Church Courts has been committed the duty of deciding whether an election of a minister has been duly made, and their decision will be accepted by the Civil Court; but the consequences of the decision, and the question whether the right to elect has passed from the congregation to the Presbytery, depend upon the construction of the Statute, which falls to be interpreted by the Supreme Civil Court (*Stewart*, 15 Nov. 1878, 6 R. 178; *Cassie*, 25 Nov. 1878, 6 R. 221).

The Church Courts of the Voluntary Churches possess no jurisdiction in the proper legal sense of the term. Accordingly, in the *Cardross* case, where a minister of the Free Church of Scotland, who had been deposed because he

had applied to the Civil Court for interdict against a sentence of suspension by the General Assembly of that body, brought actions of reduction of both sentences, and of damages against the General Assembly, alleging that the sentence of deposition "was a gross and flagrant violation of the contract or compact and rules of the Association under which the pursuer held his office and emoluments as Free Church minister," the Court held that it was necessary to examine the contract in order to see whether by it the pursuer had precluded himself from seeking redress, and that it was also necessary to examine the sentence to see whether it fell under the contract (*M'Millan*, 23 Dec. 1859, 22 D. 290, and 19 July 1861, 23 D. 1314). The tribunals of the Voluntary Churches are not courts of law, and they possess no jurisdiction and authority, except such as is conferred by their constitutions and the voluntary adherence of their members. Their decisions, therefore, cannot be defended as beyond challenge upon the ground that they are the decisions of a Spiritual Court; but, on the other hand, they will only be reviewed in so far as they affect civil rights. In the recent case of *Skerret* v. *Oliver*, 30 Jan. 1896, 23 R. 468, the following passage occurs in the opinion of Ld. P. Robertson: "Courts of law, as I understand, take no concern with the resolutions of voluntary associations, except in so far as they affect civil rights. If a man says merely, 'Such and such a resolution of an ecclesiastical body is a violation of its constitution, on the faith of which I became a member or a minister,' and stops there, the Court will have nothing to do with his case, and will not declare the illegality or reduce the resolution. But if the same man says, 'I have been ejected from a house, or have been deprived of a lucrative office, under colour of this illegal resolution, and I ask possession of the house, or I ask £100 of damages,' then the Court will consider and determine the legality of the resolution, on its way to the disposal of the demand for practical remedy. There is there a specific claim of a specific remedy for invasion of patrimonial rights. If and in so far as a decree of reduction may be necessary to effectuating such remedy, the Court will pronounce it."

The Courts of the Church are the Kirk Session, Presbytery, Synod, and General Assembly.

1. *The Kirk Session*, which is the lowest of the Church judicatories, is composed of the minister and elders of the parish. It exercises a general supervision over matters ecclesiastical, other than those which fall within the province of the minister alone; settles the time for the administration of the ordinances and sacraments of religion; admits to membership of the Church; and grants certificates of Church membership to persons leaving the parish. It further has the power of exercising discipline and imposing Church censures upon persons accused of scandalous offences against morality and the laws of the Church, but this is exercised much more sparingly in recent times than formerly. The minister of the parish is, *ex officio*, moderator of the Kirk Session, and, as such, he has no deliberative, but only a casting vote. It is his duty to call the meetings of Kirk Session, to open and close them with prayer, to preside over them, and to rule upon points of order, as these may arise. In the event of a vacancy, the Presbytery appoint one of their own number to act as moderator. Two elders and the minister form a quorum of the Kirk Session, and where the number of elders falls below two, so that it cannot be properly constituted, the Presbytery, when necessary, appoints one or more of their own number, not necessarily ministers, to act as assessors. The clerk to the Kirk Session may be either one of themselves or an outsider. In order to make a person eligible for the eldership, he

must be twenty-one years of age, and in full communion with the congregation, and if he does not live in the parish, he must either reside in it for six weeks annually, or be an heritor, paying stipend and other parish burdens, or heir-apparent of such an heritor, or have been for twelve months a communicant in the Church of Scotland, consent being obtained to his nomination from the Kirk Session of the parish in which he resides. The election is made by the Kirk Session, after an opportunity has been given to the members of the congregation to state objections to the persons proposed; and, when once elected and ordained, an elder can only be removed from office by resignation or formal deposition after due process of law. A libel against an elder proceeds, in the first instance, before the Kirk Session of which he is an elder, with the right of appeal to the superior Courts of the Church. At ordination, elders sign the formula, as regulated by the Act of Assembly, 1889, XVII., approving of the Confession of Faith, as approved of by the Church and ratified by law in the year 1690, and they further promise to submit themselves to the discipline and Presbyterian government of the Church, as established by law, and that they will never endeavour, directly or indirectly, the prejudice or subversion thereof. Subscription, in the case of elders, is not required by civil Statute, but rests upon acts of the General Assembly, and in this respect ministers are in a different position, as in their case subscription of the Confession of Faith is required by the Act of Parliament, 1693, c. 38.

The following records are ordered to be kept by the Kirk Session, and annually submitted to the Presbytery for revision, namely, Record of Proceedings, Communion Roll, Register of Baptisms, and Register of Proclamation of Banns.

2. *The Presbytery* consists of the ministers of all the parishes within its bounds, and of the Professors of Divinity of any university within its bounds, provided they be ministers, along with an elder commissioned from each Kirk Session. An assistant and successor has a seat in the absence of his principal. One of the ministers acts as moderator, and it is the practice to elect him for six months. The functions of the Presbytery are thus described by Dr. Cook in his book upon the *Practice of the Church of Scotland*:—"The business of Presbyteries is to examine students of divinity and license them to preach the Gospel; to take trial of presentees to parishes, and, if they find them qualified, to ordain them to the ministry, and grant them induction; to see that the word is preached, divine ordinances regularly dispensed, and the various duties of the ministry discharged within the bounds; to take cognisance of the conduct of each minister, and in the event of any charge being made involving censure, suspension or deposition from his office, to libel the person accused, to take evidence, to judge of the same, and pronounce sentence accordingly. It is their duty to judge of all complaints, appeals, and references which may come from an inferior Court. And, as a civil Court, it belongs to them to judge and determine, in the first instance, all matters connected with glebes, and the erection or repair of churches and manses."

Presbyteries, of which there are at present *eighty-four*, have a general duty of superintendence over the parishes within their bounds; and it belongs to them to regulate matters concerning the performance of public worship and administration of ordinances according to the laws of the Church. They can also maintain an action in the civil Courts in regard to the funds or property of the Church, and they have a right and title to insist that churches and chapels in connection with the Church within their bounds shall be used for the purpose for which

they were erected, and to enforce the observance of the constitutions, which may have been granted to them by the General Assembly (*Presbytery of Fordyce*, 14 July 1849, 11 D. 1361). Processes against a minister begin in the Presbytery to which he belongs, and may proceed at the instance either of the Presbytery or of individual parishioners. Every Presbytery is bound to keep a separate register of facts necessary for the administration of the Widows' Fund, and a Benefice Register, containing information as regards the stipends and all funds administered by the Kirk Sessions within their bounds.

3. *The Synod* is the intermediate Court between the Presbytery and General Assembly, and consists of the members of the several Presbyteries within its bounds. It generally meets twice a year, for the purpose of hearing appeals and complaints against decisions of the inferior Courts, and generally reviews their proceedings by examining their minutes, and otherwise. No appeal can be taken from the Presbytery direct to the General Assembly, unless express instructions have been given to that effect in any particular case, or unless there is no intervening meeting of Synod between the decision of the Presbytery and the meeting of General Assembly. There are sixteen Synods in the Church, one of which contains three Presbyteries, these having seventeen parishes, and another eight Presbyteries with two hundred and ninety parishes. The Synod has no legislative power, but it is competent for it, as it is for a Presbytery, to transmit an overture on any subject to the supreme Court.

4. *The General Assembly* is the supreme Court of the Church, and consists of ministers and elders elected by Presbyteries, Universities, and Royal Burghs, and by the Church in India. The commissioners from Presbyteries are in proportion to the membership of the Presbyteries, and according to the rule laid down by the General Assembly of 1893, each Presbytery sends one minister for every four on the complete roll of the Presbytery, and for a part of four; and one elder for every six ministers and part of six. Each of the four Universities sends one commissioner, the City of Edinburgh two, and sixty-nine royal burghs one each. The result is, if the elections are fully made, an Assembly of seven hundred and four, comprising three hundred and seventy-one ministers, and three hundred and thirty-three elders. In the case of burghs the election is made by the town council, and it is the practice to sustain the commissions of elders, who have been elected by a minority of the council, on the ground that the right to elect is a public trust which the majority are not entitled to abandon. The Church in India has the right to send one minister and one elder to represent it in the General Assembly. The judicial work of the General Assembly consists of appeals and complaints from the inferior Courts; and these are mainly either cases of discipline, or questions relating to disputed settlements under the Patronage Abolition Act, and the regulations framed by the Assembly for the working of the Act. To the General Assembly are also submitted the Synod Rolls, and the annual reports of the various committees of the Church, such as Home Missions, Foreign Missions, etc.; and generally it exercises supervision over the whole life and work of the Church, including the proceedings of the various inferior Church Courts. The Queen is represented at the sittings of the General Assembly, which extend annually over ten days in the latter end of May, by one of the nobility as Lord High Commissioner, and it elects one of the ministers among its number to be moderator and preside over its deliberations.

The legislative functions of the Church are vested in the General Assembly; but Synods, Presbyteries, and members of Assembly have the

right to approach it by way of overture, with the view of initiating legislation, and it is in this way that legislative projects are set on foot. The adoption of an overture, however, by the General Assembly, does not at once convert it into a law of the Church; as, by the Barrier Act, 1697, IX., before the General Assembly passes "any Acts which are to be binding rules and constitutions to the Church," or which rescind any standing Act, or which involve an essential alteration of the existing law and practice of the Church, an overture, if passed by the Assembly, must be remitted to the several Presbyteries of the Church for their consent and approval; and the next General Assembly may then convert it into an Act, if the report of the majority of Presbyteries is favourable. If half or more of the Presbyteries report their disapproval, the overture drops. See ACT OF ASSEMBLY.

The members of General Assembly, along with one other person not a member, are annually appointed as a Commission of the General Assembly; thirty-one, whereof twenty-one must be ministers, being a quorum. They are empowered to meet four times in the year, and oftener if necessary. The duties of the Commission are defined in the Act of Assembly appointing them. They are to cognosce and finally determine as they shall see cause, in every matter referred to them by the Assembly: to appoint fasts and thanksgivings as they shall see occasion, and to specify the causes thereof; to give advice and assistance to any Synod or Presbytery, or Committee of Assembly, in difficult cases, upon application to them for that end; also to attend to the interests of the Church on every occasion, that the Church, or the present establishment thereof, do not suffer any prejudice which they can prevent, provided always that the general cause be not extended to particular affairs or processes before Synods or Presbyteries, that are not of universal concern to or influence upon the whole Church, save only in respect of giving advice and assistance. They are in all things to proceed according to the Acts and Constitution of the Church, and are accountable to, and censurable by, the next General Assembly, as they shall see cause; and any Synod or Presbytery or party who shall decline to comply with the sentence of the Commission, or to give the same full execution, is answerable to the next General Assembly. It is thought that a judgment of the Commission is final, provided it acts within the powers committed to it by the General Assembly, and its procedure is regular; but see Act of Sess. vi. of Assembly, 1648, and *Cross* case (1888). As to history and powers of the Commission, see Report of Committee to Assembly, 1893.

Procedure in the Church Courts is regulated by Act of Assembly, 1707, XI., approving a form of process in the judicatures of the Church with relation to scandals and censures, and by Act of Assembly, 1889, XIX., dealing with forms and procedure in trial by libel and in causes generally. By the latter, forms of libels in the Church Courts have been assimilated to those of indictments, as now used in the High Court of Justiciary since the passing of the Criminal Procedure Act of 1888. The syllogistic form of libel is therefore no longer in use; and it is sufficient if the libel states facts which constitute a censurable offence, in the manner set forth in the schedule annexed to the Act of Assembly: and it is further enacted, as has been done with regard to indictments, that certain words of style are to be implied in every libel, though not expressed.

A member of a Church Court is entitled to dissent and complain against the judgment of the Court, and in the case of a dissent from the judgment of an inferior Court, to carry his dissent to a higher Court. A dissent and complaint brings the judgment under review of the higher Court, in the

same way as an appeal by a party.—[Reference is made to Dr. Cook's *Styles of Writs, Forms of Procedure, and Practice of the Church Courts of Scotland*, and to Dr. Mair's *Digest of Church Laws*.]

Church Lands.—See Benefice.

Churchyard.—See Burying-place.

Circuit Courts.—By the Criminal Procedure (Scotland) Act, 1887, s. 46, it is declared that every sitting of the Lords Commissioners of Justiciary shall be a sitting of the High Court of Justiciary, and the ceremonies of fencing and closing Courts by proclamation of a macer are abolished. Those sittings presided over by one or more of the Lords Commissioners of Justiciary, and formerly called Circuit Courts, are therefore now sittings of the High Court of Justiciary. Sittings of the High Court of Justiciary on circuit continue to be appointed to be held at the usual times and places at which the Circuit Courts of Justiciary were held prior to the passing of that Act, but (s. 48) no sitting of the Court is held at any place appointed where there are no cases indicted for trial, or where so many of those indicted have pleaded guilty at the first diet as to make it unnecessary to hold a special Court. In the latter case provision is made by the Statute (s. 50) for the remaining cases being brought up at any sitting to be held in any adjacent county, or any county in the same district of the country, or in Edinburgh. Any appeal which may have been taken to any sitting of the High Court at any of the circuit towns, may (s. 48), when such sitting is not held, of consent of both parties be heard at any sitting of the High Court of Justiciary at any place, or otherwise is heard in Edinburgh.

Fixing and Holding.—The times for holding the different circuits and the judges to act thereat are fixed by Acts of Adjournal passed by the High Court of Justiciary, under the authority of various Statutes and Orders in Council. Although in these Acts of Adjournal two judges are invariably named to discharge the duty of each circuit, any judge or judges of the Court of Justiciary may discharge that duty, notwithstanding such judge or judges may not have been specially named therefor.

The Act for regulating the judicatories, 1672, c. 16, which divides the kingdom into three circuit districts, directs (concerning the Justice Court, s. 5) that Circuit Courts shall be held once a year in the month of April or May, and that two judges shall go to Dumfries and Jedburgh, two to Stirling, Glasgow, and Ayr, and two to Perth, Aberdeen, and Inverness. 6 Anne, c. 6, s. 4, directed Circuit Courts to be held twice in the year, but the second circuit was superseded by 10 Anne, c. 33, and the former practice of holding one circuit in the year was reverted to. By 20 Geo. II. c. 43, s. 31, it was again directed that Circuit Courts should be held regularly twice in the year; and by 30 Geo. III. c. 17, s. 3, the judges, who were directed by the previous Statute to fix the order of each circuit by Act of Adjournal, are limited as to the time of holding the Spring Circuit, namely, between 12th March and 12th May. While 20 Geo. II. c. 43, s. 31, compelled the judges to continue six days at each circuit town, the Act of 23 Geo. III. c. 45, s. 1, directs the judges, between 1st and 20th March and 1st and 20th August in each year, to determine how long

the judges shall continue in each town, such time being not less than three days. Since the Criminal Procedure (Scotland) Act, 1887, came into force, the judges need not remain longer at any town than is necessary for the business requiring to be done.

By 20 Geo. II. c. 43, the country is allotted to the several circuit ayres, and (s. 39) power given to the sovereign of making, by Order of Privy Council, new distribution of shires and stewartries to the several circuits: and under the authority of 9 Geo. IV. c. 29, s. 3, the sovereign may similarly order additional Circuit Courts to be held in any circuit towns. In virtue of the power conferred by the said Act 9 Geo. IV. c. 29, Her Majesty's Privy Council, by Order dated 18th May 1881, directed three additional Circuit Courts in the year to be held in Glasgow, and two additional Circuit Courts to be held at Perth, Dundee, and Aberdeen. By sec. 1 of this last-mentioned Act, the High Court is directed to appoint an additional Circuit Court to be held in Glasgow "*for trying criminal causes*" at the end of December and beginning of January yearly. Appeals, though competent to all other circuits, cannot be heard at this (*Davidson*, 1844, 2 Broun, 9; *Mackenzie*, 1888, 16 R. (J. C.) 43).

The distribution of the counties and stewartries to the different circuits is now as follows:—

I. West Circuit.

Circuit Towns.	Shires and Stewartries.
Glasgow	Lanark, Renfrew, and Bute.
Stirling	Stirling, Dumbarton, Clackmannan, and Kinross.
Inveraray	Argyll.

II. North.

Perth	Perth and Fife.
Dundee	Forfar.
Aberdeen	Aberdeen, Banff, and Kincardine.
Inverness	Inverness, Ross and Cromarty, Elgin, Nairn, Sutherland, Caithness, and Orkney and Shetland.

III. South.

Ayr	Ayr.
Dumfries	Dumfries, Kirkcudbright, and Wigtown.
Jedburgh	Roxburgh, Berwick, and Selkirk.

The periods for holding the different circuits at these towns are as follows, namely:—

I. West.

Glasgow	1. End of December or beginning of January, during recess of the Court of Session. 2. February or March. 3. April or May. If a Circuit Court is held as in No. 1, this circuit is not in use to be held sooner than 20th April (see 11 Geo. IV. and 1 Will IV. c. 37, s. 3. 4. June or July. 5. August, September, or October. 6. October.
Stirling, Inveraray	1. Between 12th March and 12th May. 2. August, September, or October.

II. North.

Perth, Dundee, Aberdeen .	1. January or February. 2. Between 12th March and 12th May. 3. June or July. 4. August, September, or October.
Inverness	1. Between 12th March and 12th May. 2. August, September, or October.

III. South.

Ayr, Dumfries, Jedburgh .	1. Between 12th March and 12th May. 2. August, September, or October.

By the Criminal Procedure (Scotland) Act, 1887, it is provided that, on the requisition of the Lord Advocate, special sittings of the High Court may be held at any time and at any of the towns where circuits are in use to be held, or at any other town which may be most convenient for the trial of any crime in or near the locality in which such crime has been committed (ss. 46, 47).

For sittings of the High Court at any of the regular circuit towns, the jurors cited to attend the circuit are drawn, in proportions fixed by Act of Adjournal, from the different sheriffdoms attached to the respective circuit towns. When the High Court of Justiciary holds a sitting in any town not being one of the regular circuit towns, the jury are summoned from the general jury roll of the county in which such town is situated (Criminal Procedure Act, 1887, s. 47). The Act of Adjournal fixing each circuit is passed generally about a month before the holding of the Court, and notice of the appointment is made in Her Majesty's *Edinburgh Gazette*, and in the leading newspapers, and precepts are issued by the Clerk of Justiciary to the different Sheriffs, ordaining them to make proclamation of the circuit.

Quorum.—The Act of 1672, c. 16, directs that two judges be appointed to go to each of the three circuits, and declares that the Justice-General shall be supernumerary. Sec. 32 of the Act 20 Geo. II. c. 43, makes it lawful for any one of the judges to despatch business whenever it shall happen that his colleague, through indisposition or other necessary avocation, be absent. The Act 11 Geo. IV. and 1 Will. IV. c. 69, s. 19, provides that the Lord Justice-General may despatch the business of the circuit though no other judge be present. Two judges may sit in separate court-rooms (31 & 32 Vict. c. 95, sec. 2), and this is regularly done at nearly all the Glasgow circuits. By s. 3 of the Act last mentioned, one of the judges at a circuit may proceed to the next circuit town and there open the Court and despatch business, although the other circuit be not completed. In practice two judges are named in the Act of Adjournal to go to each circuit, but of late only one judge has been in use to go to each town (with the exception of Glasgow), and he need not be either of those named in the Act of Adjournal (9 Geo. IV. c. 29, s. 2).

Jurisdiction.—Although by the Criminal Procedure Act, 1887, ss. 1 and 46, Circuit Courts of Justiciary are declared to be sittings of the High Court of Justiciary, the area within which the High Court of Justiciary on circuit exercises jurisdiction is not extended, but the jurisdiction is, as formerly, limited to crimes committed within the area of the respective circuits, and such crimes committed outwith that area where by Statute the delinquent is made amenable to the jurisdiction of the Court, although the crime may

not have been committed within the area of the circuit. Theft may be tried in any jurisdiction where the thief is found with the stolen property in his possession. Power is given by several Statutes to try persons charged with certain crimes at the place of apprehension, as for example, 5 Geo. IV. c. 84, s. 22—as to the crime of being at large before the expiry of a sentence of transportation; 18 & 19 Vict. c. 91, s. 21—as to crimes committed at sea. The Criminal Procedure Act, 1887, s. 22, provides that where a crime has been committed partly in one county and partly in another, or where one crime following on and connected with another crime has been committed in a different county from that in which the first was committed, or where several crimes which, if committed in one county, could now be tried under one indictment, are alleged to have been committed by any person in different counties in succession, a person accused may be indicted to a Court in such one of such counties as shall be determined by the Lord Advocate. By the same Act, s. 51, where any crime is committed in any county of an existing circuit in which no sitting of the High Court of Justiciary falls to be held in ordinary course for some months thereafter, it is competent to indict the person accused to any sitting of the High Court to be held sooner in another county in an adjacent circuit district. Where a person accused has, under sec. 31, pleaded guilty before the Sheriff and been remitted to the High Court of Justiciary for sentence, he may be brought before any sitting of the High Court of Justiciary at any place that may be convenient, as the Lord Advocate may order.

Certification.—The High Court of Justiciary on circuit may certify any case commenced before it to Edinburgh, and when this is done the certification must be to a day fixed (*Fraser*, 1852, 1 Irv. 1).

As to appeals to the High Court of Justiciary on circuit, see APPEAL TO CIRCUIT COURT.

Circuit, Small Debt Court.—In addition to the ordinary Small Debt Courts, sheriffdoms are divided into districts, in which Small Debt Circuit Courts are held periodically (1 Vict. c. 41, s. 23). See SMALL DEBT COURT.

Circuit Court: Appeal to, from the Small Debt Court.—Appeal, where competent, against a decision of the Sheriff in the Small Debt Court is to the next Circuit Court of Justiciary, or, where there are no Circuit Courts, to the High Court of Justiciary at Edinburgh (1 Vict. c. 41, s. 31). See APPEAL TO CIRCUIT COURT; SMALL DEBT COURT: REVIEW.

Circular Notes.—These are notes issued by bankers to persons about to proceed abroad, entitling the holder whose name is inserted in the notes to receive in exchange therefor, from the foreign correspondents of the issuing bank, a sum equivalent to that paid by him to the bankers in this country. Along with the notes there is given to the purchaser a "letter of indication," containing a list of the bank's correspondents, by any of whom the full amount will be paid at the current rate of exchange at usance on London. If the town where payment is required has not a direct exchange with London, a rate is arranged in accordance with the nearest

place of exchange. At the foot of the letter of indication there is a blank space for the signature of the owner of the notes, as a precaution against forgery should the notes fall into improper hands. The circular notes and letter of indication are practically parts of one document, and the owner of them is not entitled to receive payment from the correspondents of the issuing bank except in exchange for the circular notes duly endorsed and production of the letter of indication. Circular notes are not negotiable (per Willes, J., in *Conflans Quarry Co.*, 1867, L. R. 3 C. P. 1, at p. 8). In the event of the circular notes being lost or stolen, the owner of them is not entitled to recover from the issuing bank the value thereof in exchange merely for the letter of indication. The bank are entitled to receive an indemnity satisfactory to them against payment (*Conflans Quarry Co., supra*). It is not obligatory upon the holder to cash the circular notes abroad, though he purchases a right to do so if he thinks proper. In the event of his not requiring to use them abroad, he may, after reasonable notice of his electing not to use them, require payment at the issuing banker's hands. Circular notes must not be confounded with letters of credit. There is no analogy between these two kinds of instruments. LETTERS OF CREDIT.

Circumduction of the Term.—Term, in judicial procedure, is the time allowed by the Court within which a party is entitled to prove his averments. Circumduction of the term is the sentence of the judge declaring that the term has elapsed. The words of the decree are: "The Lords circumduce the term, and decern" (Stair, iv. 46. 6). A prorogation of the term may, however, be granted, where the party leading the proof was not to blame for the delay (Shand, *Practice*, 359; *Kennedy*, 1867, 5 M. 557; but see *Paterson*, 1856, 18 D. 663). Where the term has been circumduced but a fresh term is granted, the interlocutor runs thus: "Open up the circumduction: allow the pursuers to lead evidence in terms of the former allowance of proof . . . ."

Circumstantial Evidence.—See EVIDENCE.

Circumvention (Facility and).—According to Ld. Stair (*Inst.* i. 9. 9), "circumvention signifieth the act of fraud whereby a person is induced to a deed or obligation by deceit." The expression is only found in conjunction with facility, where it is sought to reduce a deed under the well-known issue of fraud and circumvention. This issue presents two questions to the jury—(1st) Whether the granter of the deed was weak and facile and easily imposed on; and, (2nd) Whether the defender (or others, as the case may be), taking advantage of the said weakness and facility, did by fraud or circumvention obtain from the granter the said deed to his lesion. Lesion, even coupled with weakness of mind, of themselves afford no ground for reduction. Thus Ersk. (*Inst.* iv. 1. 27) says: "Though a deed under challenge should appear hurtful to the granter, and irrational for one in his situation, if it do not carry in its bosom plain marks of oppression, it is not reducible without an actual proof of dole, even though the granter should appear to be of a facile temper, *i.e.* apt to be imposed upon. . . . Yet where lesion in the deed and facility in the granter concur, the most slender circumstances of fraud or circumvention are

sufficient to set it aside" (*Scott*, 1825, 3 Murray, 526; *M'Kirdy*, 1839, 1 D. 855).

It is now always put to the jury alternatively whether there has been fraud or circumvention in the impetration of the deed (*Mann*, 1861, 23 D. 435). Fraud and circumvention, it has been said, are just two shades of the same thing: the two pass into each other by such shadowy gradations, that they are often difficult to be distinguished. If a distinction, however, is to be drawn, circumvention seems more appropriately applied to a course of deception than to a single act of deceit; and hence in many cases the Court have refused to interfere with the verdict of a jury in favour of a pursuer, although there was no direct evidence of actual fraud. In dealing with what are the essentials that have to be proved in an issue of facility and fraud or circumvention, L. J. C. Hope, in *Clunie* (1854, 17 D. 15, at p. 18), said: "It was contended that we must find some positive fact proved which amounts in itself to a distinct act or piece of circumvention some trick, some particular practising on the mind of the party at a particular time; some details, in short, as to the acts and practices which the general term circumvention includes; and that, if one cannot lay one's hand on distinct instances, detected and proved, of particular acts and practices amounting to circumvention, there is no ground for supporting the verdict. If such a view were taken of the question to be investigated under the second issue (*i.e.* of facility and circumvention), and of the mode in which alone it was competent for a jury to arrive at a verdict on that issue, I believe nineteen out of twenty of the cases in which deeds have been set aside under this issue must have failed. The correct view of the matter is quite different. . . . What passes is commonly with some one party, either the defender or an agent, and is either unknown, or, if such party is examined, all practices may be positively denied, which raises a question as to his veracity for the jury. But if the facts satisfy the jury that there was in such party a motive to mislead and induce him to enter into the transaction, either for his own benefit or for the benefit of someone whose interest he was promoting, and that only under persuasion and untrue representations, acting on a mind facile or nervously anxious, from disease, on the subject, could have brought about the result, then it is for the jury to say whether they draw from the whole case the inference of circumvention."

To reduce a deed, there must be some correspondence between the facility and the kind of arts alleged to have been employed against the granter (*Morrison*, 1862, 24 D. 625). But in seeking to set aside a will, the fraud founded on as having led to the impetration of the deed need not have been employed by the beneficiaries, for no party, however innocent, is entitled to take benefit by a fraud (*Taylor*, 1865, 3 M. 928; Bell, *Com.* i. 136; Bell, *Prin.* 14; Mackay, *Manual*, 403; *M'Culloch*, 1857, 20 D. 206; *M'Kellar*, 1861, 24 D. 143; *Lore*, 1870, 9 M. 291 (intimidation coupled with fraud or circumvention). See FRAUD.

Undue Influence.—Without actual proof of facility in the granter of a deed, acts of circumvention falling short of fraud do not warrant reduction, except in the special case where a party acquiring a benefit has abused a position of trust and influence. To this form of circumvention is given the specific name of "undue influence." In England, where the doctrine has been more developed than in Scotland, relief is given, not only where the parties stand in a fiduciary relation to one another, but also where persons clothe themselves with a character which brings them within the range of the principle which is held to apply to all the variety of relations by which

dominion may be exercised by one person over another (*Huguenin*, 14 Ves. 273; *Morley*, 1893, 1 Ch. 736, at pp. 752, 756). Thus, jurisdiction in relieving against transactions has been exercised in actions between medical man and patient (*Mitchell*, 8 Q. B. D. 587), keeper of lunatic asylum and patient (*Wright*, 13 Ves. 136), minister and person under spiritual influence (*Huguenin, sup.*), young man in regiment and superior officer (*Lloyd*, 6 Beav. 309), near relations, etc. (*Sturge*, 12 Beav. 229; *Harvey*, 8 Beav. 439). (See list of cases at pp. 166, 167 of Ker on *Fraud*, 2nd ed.) The rule does not apply where the relation between the parties is not lawfully constituted, as in the case of a man and a woman living in adultery (*Hargreave*, 6 Ir. Ch. 278).

The doctrine of undue influence is not so well known in Scotland. In *Gray* (1879, 7 R. 332), however, Ld. Shand adopted the English view, that, without affirming either facility, or fraud, or circumvention, a Court may give relief where undue influence has been used to procure a deed to his own advantage by a person enjoying a position of confidence and trust. His lordship states the principle quite generally at p. 347, where he says: "The circumstances which establish a case of undue influence are, in the first place, the existence of a relation between the granter and grantee of the deed which creates a dominant or ascendant influence, the fact that confidence and trust arose from that relation, the fact that a material and gratuitous benefit was given to the prejudice of the granter, and the circumstance that the granter entered into the transaction without the benefit of independent advice or assistance." In that case a deed of disentail, granted by a young man of twenty-four, was reduced on the ground that it had been obtained from him by his mother and her solicitor by taking advantage of the son's ignorance of his rights and his confidence in them. The case was tried by a judge, and the other judges in the Inner House did not adopt all the reasoning of Ld. Shand. In particular, Ld. Deas (at p. 350) said that, if the case had gone to a jury, it might quite well have been tried under the ordinary and well-established issue of facility coupled with fraud or circumvention, to the lesion of the granter of the deed.

As regards issues in reduction cases before juries, there appears to be only one reported case in which undue influence has been allowed as a separate issue (*Harris*, 1864, 2 M. 664). That was an action of reduction of a disposition by a client in favour of his law agent; and one of the issues approved of was: "Whether the defender, being at the time the law agent of the deceased *A.*, did wrongfully, and in violation of his duty as agent foresaid, induce the said *A.* to enter into the minutes of agreement to the lesion of the said *A.*" A law agent's position, however, is peculiar (see *dicta* in *Watt*, 1877, 5 R. (H. L.) 9), and the law examines particularly strictly into the circumstances under which any provision in his favour is obtained from a client. In *Grieve* (1869, 8 M. 317, at p. 322), Ld. Barcaple said: "In many, perhaps in most cases, the presumption against the deed created, by the mere circumstance that the party favoured is the law agent who prepared it, will supply the want of all other elements of fraudulent impetration" (see also *Cleland*, 1878, 6 R. 156; *Anstruther*, 1856, 18 D. 405; *Watt*, 1877, 5 R. (H. L.) 9). But, except where a law agent has derived direct personal benefit, Scots Courts have been unwilling to allow a separate issue of undue influence to go before a jury. In *Munro* (1874, 1 R. 522), the question was raised whether an issue should be allowed that a deed was obtained by undue influence exercised by a clergyman. The point was not decided, as it was held that there was no case stated on record

that raised the question. Similarly, the Court refused an issue of undue influence in the two recent cases of *M'Callum* (1894, 21 R. 824) and *Rooney* (1895, 22 R. 761). In the former of these cases, it was averred that the testatrix had become debilitated by drinking; that the defender had, three months before the death of the testatrix, been employed as a nurse; that she had taken advantage of the patient's craving for alcohol, plied her with drink, and by this and other means obtained a will in her own favour. The Court held that only an issue of facility and circumvention should be allowed, the element of undue exercise of legitimate influence not rendering it necessary to take a separate issue. In the latter case a will had been prepared by a law agent, who took thereunder a benefit of £500 to himself. The substantial interest, however, consisting of a residuary bequest of about £25,000, was given to the natural son of the testator. The Court, following *M'Callum's* case, held that the next-of-kin, who sought to reduce the will, were not entitled to an issue of undue influence, as the case was not one in which the law agent was called on to give up a benefit which he had illegitimately obtained through the undue exercise of his influence as legal adviser.—[See the doctrine of undue influence discussed in the following in addition to the cases already quoted: *Anstruther*, 1856, 18 D. 405; *Marianski*, 1841, 3 D. 1036; *Tennant*, 1870, 8 M. (H. L.) 10; *Graham*, 1820, 6 S. 479; *Smith Cunninghame*, 1872, 10 M. (H. L.) 39; *Wardlaw*, 1859, 21 D. 940; *Menzies*, 1893, 20 R. (H. L.) 108; Bell, *Prin.* 14; Ker on *Fraud*, 158 *seq.*; Moncreiff on *Fraud and Misrepresentation*, 260, 291 *et seq.*; Pollock on *Contracts*, 6th ed., 579.]

Citation.—Citation is the calling of a defender in an action to appear in Court; or of a person to give evidence or to do some other judicial act; or of a juror to attend. Citation is either (1) personal, or (2) at the dwelling-place, or (3) edictal.

1. *Personal Citation* is made by delivery to each defender of a copy of the summons or other writ, with schedule of citation annexed, calling him to appear within the *inducia*, which are seven days if he is within the mainland of Scotland, and fourteen days if in any island of Scotland or furth of Scotland (31 & 32 Vict. c. 100, s. 14). Shorter *inducia* are competent in certain cases (A. S. 21 June 1672). Service must be by a messenger-at-arms, or by a sheriff officer, if no messenger resides in the district (Act, 1693, c. 12; 31 & 32 Vict. c. 100, s. 19); or, in consistorial actions, by anyone duly authorised by the pursuer where the defender is not resident in Scotland (s. 100). A decree in absence, following personal citation after the lapse of sixty days from the expiry of an unsuspended charge, or of twenty years, if the decree is one on which a charge is not competent, has the effect of a decree *in foro* (s. 24). An officer serving a summons, petition, appeal, or note of suspension or interdict, need not now have in his possession the original warrant, so long as he has a copy thereof, certified as correct by the agent in the cause, and exhibits it to the party on whom the service is made if required (s. 16). There must be one witness to the execution, except in poindings, when two are required (1 & 2 Vict. c. 114, s. 32; 9 & 10 Vict. c. 67).

2. *Citation at the Dwelling-Place* is regulated by the Act of 1540, c. 75, and is competent only when the party cannot be found personally: but in practice "personal service is not insisted on whenever the officer has not seen the defender in going to look for him at his principal dwelling-place" (Dove Wilson, *Sheriff Court Practice*, p. 112). The dwelling at which

citation may be made "may be any house in Scotland at which the defender has resided forty days continuously, and from which he has not been absent forty days" (Mackay, *Manual of Practice*, p. 197; A. S. 14 Dec. 1805). When a person has a proper domicile, where his family and servants reside, he may be cited there even though forty days absent (*Fraser*, 1821, 1 S. 76; *Thomson*, 1833, 12 S. 557). Citation at one of several residences is sufficient (*Douglas & Heron*, 1779, Mor. 3700; *Macdonald*, 1843, 5 D. 1253). If, however, the party has finally left his residence and the country, he should be cited edictally (*Brown*, 1849, 11 D. 474). Citation must be at the party's dwelling-place, not at his place of business; but a corporation, society, company, or firm is properly cited at its principal place of business (*Sharp, Fairlie, & Co.*, 1822, 1 S. 337; *Young*, 1860, 22 D. 983). Statutory provision is made for the citation of many public and corporate bodies, through their secretary or other officer (see *infra*). The execution must bear to have been at the dwelling-place or place of business. The summons may be delivered to any servant, or to any member of the family (Ersk. ii. 5. 55), or possibly to any person in the house, who in receiving it will be presumed to be a servant (*A.*, 1834, 12 S. 347). If delivery is refused, or access cannot be got to the house, the warrant must be fixed to the most patent door, and in the latter case the messenger must give six distinct knocks (Act 1540, c. 75; *Duff*, 1707, Mor. 3775). In practice, the summons, with schedule of citation annexed, is commonly fixed into the keyhole. (See KEYHOLE CITATION.) By 34 & 35 Vict. c. 42, this mode of citation is not competent in Small Debt cases, unless the officer is satisfied that the defender is refusing access or concealing himself to avoid citation, or has removed within forty days, his dwelling-place for the time being unknown; in either of these cases the officer may fix the writ to the door or leave it with an inmate, and send a copy by registered post to the defender's last known address, or to that which the officer thinks, after diligent inquiry, most likely to reach him (s. 3). The officer's execution must bear that he endeavoured to effect service at the defender's last known dwelling-place, and the circumstances that prevented it, and must be accompanied by the post-office receipt for the registration. No witness is necessary except in cases of poinding, sequestration, or charging (s. 4).

Citation by Registered Letter is regulated by 45 & 46 Vict. c. 77. Sec. 3 provides that, "in any civil action or proceeding in any Court, or before any person or body of persons having by law power to cite parties or witnesses, any summons or warrant of citation of a person, whether as a party or a witness, or warrant of service or judicial intimation, may be executed in Scotland by an officer of the Court from which such summons, warrant, or judicial intimation was issued, or other officer who, according to the present law or practice, might execute the same, or by an enrolled law agent, by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served, or to his last known address, if it continues to be his legal domicile or proper place of citation, or to the office of the Keeper of Edictal Citations, where the summons, warrant, or judicial intimation is required to be sent to that office, a registered letter by post containing the copy of the summons, or petition or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances; and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address, if it continues to be his legal domicile or proper place for citation" (*Alston*, 1887, 15 R. 78;

Stewart, 1885, 12 R. 563). The following provisions are contained in sec. 4 :— (1) The citation shall specify the date of posting, and, in cases where the party is not cited to a fixed diet, but to appear or lodge answers or other pleadings within a certain period, shall state that the *inducice* for appearance or lodging such answers or pleadings are reckoned from the date of posting; (2) the *inducice* shall be reckoned from twenty-four hours after the date of posting; (3) the execution to be returned by the officer or law agent shall be accompanied by the post-office receipt for the registered letter, and may be in the following form (Schedule I. of the Act) :—

This summons, or warrant of citation, or note of suspension, or petition, or other writ or citation executed [*or* intimated] by me [*insert name*], messenger-at-arms [*or* other officer or law agent], against [*or* to] [*insert name or names*], defender [*or* defenders, *or* respondent or respondents, *or* witness or witnesses, *or* haver or havers, *or otherwise, as the case may be*], by posting on last, between the hours of and , at the post office of , a copy of the same to him [*or* them], with citation [*or* notice] subjoined [*or* citation, *or* notice, *where no copy is sent*], in a registered letter [*or* registered letters], addressed as follows, viz. :

[*Signature of officer or agent*].

The execution returned by a law agent shall for all purposes be equivalent to an execution returned by an officer of Court; (4) on the back of the registered letter there shall be written or printed the following notice, or a notice to the like effect: "This letter contains a citation to or intimation from [*specify the Court*]. If delivery of the letter cannot be made, it is to be returned immediately to [*give the official name and office or place of business of the Clerk of Court*]" (*Wilson*, 1885, 13 R. 342); (5) "If delivery of the letter be not made because the address cannot be found, or because the house or place of business at the address is shut up, or because the letter-carrier is informed at the address that the person to whom the letter is addressed is not known there, or because the letter was refused, or because the letter is not within a postal delivery district, and the letter is not called for within twenty-four hours after its receipt at the post office of the place to which it is addressed, or for any other reason, the letter shall be immediately returned through the post office to the Clerk of Court, with the reason for the failure to deliver marked thereon, and the clerk shall make intimation to the party at whose instance the summons, warrant, or intimation was issued or obtained, and shall, where the order for service was made by a judge or magistrate, present the letter to a judge or magistrate of the Court from which the summons, warrant, or intimation was issued, and he may, if he shall think fit, order service of new, either according to the present law and practice, or in the manner hereinbefore provided, and, if need be, substitute a new diet of appearance. Where the judge or magistrate is satisfied that the letter has been tendered at the proper address of the party or witness, and refused, he may, in the case of a witness, without waiting for the diet of appearance, issue second diligence to secure his attendance, and in the case of a party hold the tender equal to a good citation." This mode of service is declared to be optional, but it is provided that no higher fees shall be allowed on taxation than those laid down in Schedule II. of the Act, for service in any other mode, unless the judge or magistrate deciding the case shall be of opinion that it was not expedient in the interests of justice that such service should be made in the manner provided in the Act (s. 6) (*M'Leod*, 1887, 14 R. 298).

3. *Edictal Citation* is employed when the party to be cited is resident furth of Scotland, or when a person, "not having a dwelling-house in Scotland occupied by his family or servants, shall have left his usual place

of residence, and have been therefrom absent during the space of forty days, without having left notice where he is to be found within Scotland" (6 Geo. IV. c. 120, s. 53). It is not competent when the defender is in Scotland, though his friends will not reveal his address (*Robertson*, 1836, 14 S. 950); but it is competent when the defender has led the pursuer to believe that he has left Scotland (*Sandbach & Co.*, 1825, 4 S. 171). Edictal citation is made by registered letter (see *supra*), or by delivery of a copy of the summons, with schedule of citation annexed, by a messenger-at-arms at the office of the Keeper of Edictal Citations at the General Register House. An abstract of the copy, exhibiting the time of service, the nature of the writ, the names and designations of the parties, and the day against which the parties are called to give obedience, is made in the Register of Edictal Citations (6 Geo. IV. c. 120, s. 51; A. S. 24 Dec. 1838, s. 7). By 13 & 14 Vict. c. 36, s. 22, edictal citation in the above form was extended to actions of ranking and sale, and all other processes and proceedings, including citation of minor's next-of-kin, in actions of choosing curators, and of tutors and curators in actions against minors. When a defender has a known residence or place of business in England or Ireland, in addition to edictal citation, notice of the summons or writ must be given to the defender himself at his residence or place of business, or to his known agent in Scotland, if he have one. Sufficient notice is given if a registered post letter, posted at the general post-office in Edinburgh fourteen days prior to the first enrolment of the cause, enclosing a full copy of the summons or other writ, including the warrant of citation and citation following thereon, be addressed to the defender at his residence or place of business. In undefended causes, where the defender is designed as carrying on business in some particular place in England or Ireland, the interlocutor must state that the Lord Ordinary has been satisfied, on proof, that reasonable notice has been given, either to the defender's known agent in Scotland, if he any have, or to the defender himself at his residence or place of business in England or Ireland; but nothing in such interlocutor precludes the defender from showing, in reduction of the decree in absence, or in any other subsequent proceeding, that reasonable notice has not been given (A. S. 18 Dec. 1868, ss. 1, 2, 4, and 5; *D. of Atholl*, 1872, 10 M. 298).

In *Consistorial Actions* the summons must be served on the defender personally, when he is not resident in Scotland, by a person duly authorised for the purpose (31 & 32 Vict. c. 100, s. 100); but if it is proved to the Court that the defender cannot be found, edictal citation will be allowed (*M'Callum*, 1865, 3 M. 550; Fraser, *H. & W.* ii. 1545; Walton, *H. & W.* p. 317). In that case "the pursuer shall also serve the summons on the children of the marriage, if any, and on one or more of the next of kin of the defender, exclusive of the children of the marriage, when the said children are known and resident within the United Kingdom, and such children and next of kin, whether cited, or so resident or not, may appear and state defences to the action" (24 & 25 Vict. c. 86, s. 10).

There are many Statutes which allow corporate bodies and certain companies, societies, and public bodies to sue and be sued in the name of a particular officer. Corporations, *e.g.* town councils, at common law, are cited at a meeting by delivery of a copy of the summons to the preses for himself and the other representatives, by citation of the individual members. A county council is incorporated under the name of the county council of the county, and is cited as such (52 & 53 Vict. c. 50, s. 72). Commissioners of police are cited under their corporate name, *e.g.* "Commissioners

of the Burgh of ," by service of the writ upon their clerk (Burgh Police (Scotland) Act, 1892, 55 & 56 Vict. c. 55, ss. 56, 338). A parish council is cited under the name of the parish council of the parish (57 & 58 Vict. c. 58, s. 32). A school board is a corporate body, and may be cited through the chairman at a meeting, or by calling all its members (35 & 36 Vict. c. 62, s. 22). A presbytery may be cited in the same way. Under the Companies Clauses Act, 1845, 8 & 9 Vict. c. 17, s. 137, and the Railways Clauses Act, 8 & 9 Vict. c. 33, s. 130, companies and railway companies may be cited by leaving at, or transmitting through the post directed to, the principal office of the company, or one of the principal offices where more than one, or by giving personally to the secretary, or, if no secretary, to one of the directors, the summons, writ, or notice. Promoters of companies under the Lands Clauses Act, 8 & 9 Vict. c. 19, s. 128, may be cited by a copy left at, or sent by post to, their principal office, or one of the principal offices, where more than one, given personally or sent by post to the secretary, or, if no secretary, the solicitor. Industrial and provident societies, if registered under the Act of 1893, become corporate bodies, and are cited at their registered office, under their registered name (56 & 57 Vict. c. 39, ss. 11 & 21). Building societies may be cited under the name set forth in their contract, presumably at their place of business (18 & 19 Vict. c. 88, s. 3; Campbell on *Citation*, p. 39); or, if registered under 37 & 38 Vict. c. 42, they become a corporation, and are cited under their registered name (s. 9). Friendly societies are cited by personally serving the officer or person against whom, on behalf of the society, the summons, writ, process, or other proceeding is issued; or by leaving a true copy thereof at the registered office of the society, or at any place of business of the society within the jurisdiction of the Court in which the proceeding is brought; or, if such office or place of business be closed, by posting such copy on the outer door of the same; but in all cases where the writ is not served personally, or a copy left at the registered office, a copy must be sent to the committee of management at the registered office of the society by registered letter, posted at least six days before any further step is taken in the proceeding (38 & 39 Vict. c. 60, s. 21). Registered joint-stock companies are cited by leaving the summons, or sending it by registered post to the company at its registered office (25 & 26 Vict. c. 89, s. 62). Under the Merchant Shipping Act (17 & 18 Vict. c. 104), citation is good if made "personally on the person to be served, or at his last place of abode, or, if made by leaving such summons for him on board any ship to which he may belong, with the person being or appearing to be in command or charge of such ship" (s. 522). All actions against the Crown or any public department are directed against the Lord Advocate, who may be cited either personally or at his dwelling-place. The writ should also be served upon the department specially concerned (20 & 21 Vict. c. 44, ss. 1 & 2, 19 & 20 Vict. c. 56, s. 22).

A certificate of the mode in which the citation has been made must be returned by the officer making it, or by the law agent when the mode is by registered letter, and is called the execution. A statutory form is given by 13 & 14 Vict. c. 36, s. 20, Schedule B. One witness is sufficient except in poindings, where two are necessary. "No party appearing in any action or proceeding in the Court of Session shall be entitled to state any objection to the regularity of the execution or service, as against himself, of the summons, or other pleading or writ whereby he is convened" (31 & 32 Vict. c. 100, s. 21). The same rule applies in the Sheriff Court (39 & 40 Vict. c. 70, s. 12 (2)). Formal citation is sometimes dispensed with of consent, and

the defender's agent accepts service on his behalf. Acceptance of service should be in writing, indorsed on a copy of the summons, and should be holograph or probative.

Citation of Jurors.—See CITATION OF JURY.

Citation of Witnesses.—A copy of the interlocutor fixing the trial, certified by the Clerk of Court, or his assistant, is now a sufficient warrant for the citation of a witness (13 & 14 Vict. c. 36, s. 43), and the citation is now usually made by registered letter (see *supra*). If the witness disobeys the citation, letters of second diligence may be applied for, which are issued by the Clerk of Court, and pass the Signet: in that case it should be made to appear that sufficient money to convey the witness to the place where he is to depone has been tendered to him (Campbell on *Citation*, p. 120). Citation of witnesses out of the jurisdiction of the Court is provided for by 17 & 18 Vict. c. 34. The Court or judge may order that "a warrant of citation shall issue in special form, commanding such witness to attend such trial, wherever he shall be within the United Kingdom, and the service of any such writ or process in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if the same had been served within the jurisdiction of the Court from which it issues" (s. 1). "Every such writ shall have at foot thereof a statement or notice that the same is issued by the special order of the Court or judge, as the case may be; and no writ shall issue without such special order" (s. 2). A witness who makes default after such notice may be punished by the Supreme Court in his own country, upon a certificate of such default from the Court issuing the writ (s. 3); but it must be shown that sufficient money to defray the expenses of coming and attending was tendered to the witness (s. 4). Neglect or refusal to appear amounts to contempt of Court, and the punishment is in the discretion of the Court. The Act does not prevent the issuing of a commission to examine witnesses out of the jurisdiction.

In the *Sheriff Court*, the warrant to cite, which is written in the form of an interlocutor upon the petition, is in general authority for service within the sheriffdom only. In order to make the warrant valid in another sheriffdom, it must be endorsed by the Sheriff Clerk in that sheriffdom; but endorsation is not necessary where the defender is subject to the jurisdiction by reason of his carrying on a business within the county (39 & 40 Vict. c. 70, s. 46); or because the action is one of forthcoming or multiplepoinding, and the arrestee or holder of the fund is within the jurisdiction (s. 47).

In the case of citation by registered letter, it would appear that, where the citation is to be made outwith the sheriffdom, and the warrant requires endorsation in another sheriffdom, it is the officer of the second sheriffdom who should cite. The same rule would probably apply to a law agent executing a citation by registered letter (Dove Wilson, *Sheriff Court Practice*, p. 120).

Citation for Interrupting Prescription.—Citation on a summons under the Signet, containing the grounds of interruption, may be used to interrupt either the positive or the negative prescription. In the positive prescription, by citation at the instance of the party in right of the property against the party in possession, in a process for the recovery of possession; in the negative prescription, by citation at the creditor's instance, in a process against the debtor for recovery of the debt. By the Act 1669, c. 10, the citation in both cases, unless renewed, is extinguished as an interruption after seven years, except the parties be minors, in which case the Act does

not extend to them during their minority; but if, after citation, the summons is called, and the action is brought into Court, the interruption endures for forty years (Ersk. iii. 7. 43; Bell, *Prin.* 2007). To protect purchasers and singular successors, it is provided that, in order to make the citation effectual, the summons and execution must be registered within sixty days in the General Register of Sasines (Act 1696, c. 19; 31 & 32 Vict. c. 64, s. 15; Ersk. iii. 7. 38). See PRESCRIPTION.

[For citation in criminal cases, see CITATION ON SUMMARY COMPLAINT CRIMINAL PROSECUTION; CITATION OF JURORS.]

[See Stair, iv. 3. 27; iv. 38. 2; Ersk. i. 2. 18 & 19; Ross, *Lectures*, i. 237, 292; Campbell on *Citation*; Shand, *Practice*; Mackay, *Manual of Practice*; Dove Wilson, *Sheriff-Court Practice*; Dickson on *Evidence*; *Juridical Styles*, iii.]

See ABSENCE, DECREE IN; DOMICILE; EDICTAL CITATION; EXECUTION; FOREIGN; JURISDICTION; INDUCIÆ; PRESCRIPTION; WITNESS.

Citation of Jury.—The qualifications of jurors, the numbers to be cited, the respective areas from which they are to be chosen for the different courts, the system of arranging the order in which they are to be called upon to serve, and the manner of citation, are now all regulated by Statute.

CRIMINAL CASES.

Qualification.—Every man between the ages of 21 and 60 years, other than those excepted by 6 Geo. IV. c. 22, is qualified as follows:—

As a common juror if he (1) is seised in his own right, or in the right of his wife, in lands or tenements within the county or shire, city or place, from whence the jury is to come, of the yearly value of £5 at the least; or

(2) Is worth £200 of personal estate at the time of the trial;

As a special juror if he (1) pay cess on £100 of valued rent in the shire, city, or county where he dwells;

(2) Or pays taxes to the Crown on a house of £30 yearly rent;

(3) Or be infeft in lands and heritages in Scotland of £100 sterling of real rent per annum;

(4) Or possesses personal property to the amount of £1000 sterling. (55 Geo. III. c. 42, s. 25; 6 Geo. IV. c. 22, s. 1; 7 Geo. IV. c. 8, s. 1.)

If an accused person be a landed man, he is entitled to have a majority of landed men on the jury. (For exemptions, see CHALLENGE OF JURORS.)

Areas from which Jury are drawn.—Prior to the Act of 1672, regulating the judicatories, the prosecutor, public or private, had the entire trust of making up the list of assize, the jurors being chosen generally from the neighbourhood of the panel's residence or of the *locus delicti*, however distant from the place of trial. In all criminal trials in any inferior Court, the jury are now drawn from the county in which the Court is held (6 Geo. IV. c. 22, s. 9); but it is provided by sec. 27 of the Act 1 & 2 Vict. c. 119, that, except in the counties of Haddington, Linlithgow, Peebles, Selkirk, Kinross, Clackmannan, Nairn, and Cromarty, it shall not be necessary to summon jurors to attend who reside beyond such distances from the court-house as may from time to time be fixed by the Sheriffs of these counties, with the approbation of Her Majesty's principal Secretary of State for the Home Department. It is further provided by the said section, that in Orkney and Zetland the jurors shall be summoned from the Mainland of each district respectively.

The jurors to serve at sittings of the High Court of Justiciary at

Edinburgh are drawn from the counties of Edinburgh, Haddington, Linlithgow (6 Geo. IV. c. 22, s. 7), and Peebles (39 & 40 Vict. c. 152, Local). For trials before the High Court of Justiciary sitting at any of the regular circuit towns, the jurors are drawn from the counties within the circuit (6 Geo. IV. c. 22, s. 8); and when that Court exercises its power of holding a sitting at any place out of Edinburgh other than one of the regular circuit towns, the jury are drawn from the county in which such place is situated (50 & 51 Vict. c. 35, s. 47).

How Roll and Lists made up.—By the Act of 1672, regulating the judicatories, it was enacted "that persons to pass upon assizes be listed and their names and designations insert in ane roll to be signed by the said judges or their quorum." Following this, the Act of Adjournal of 1690 appointed the list to be made up by the Clerk of Court at the sight of one of the judges, and in practice this duty came to be discharged by the Clerk alone.

By the foresaid Act (6 Geo. IV. c. 22, s. 3) the Sheriff of each county is directed to make up a list of persons within his county qualified and liable to serve as jurors; and (s. 4) as soon as such roll or list of jurors has been made up and inserted in a General Jury Book, the Sheriff of every county is directed to select therefrom a list of all persons qualified to be special jurors, and to enter in a book, called the Special Jury Book, the names so selected. By sec. 5 separate lists are directed to be made for the counties of Edinburgh and Lanark, the former being divided into three districts and the latter into two. By sec. 6 the Sheriffs of Haddington and Linlithgow are directed to transmit certified copies of the lists made up by them to the Sheriff of Edinburgh. By the Act 39 & 40 Vict. c. 152, the county of Peebles is added to the Edinburgh district and removed from the Jedburgh circuit district, and certified copies of the lists of assize are in like manner transmitted from that county to the Sheriff of Edinburgh.

From these rolls the various lists of assize for all criminal trials by jury in Scotland are made up, the names being taken in the order in which they appear in the rolls, one-third of the number required being qualified as special jurors. This direction is repeated in the Criminal Procedure (Scotland) Act, 1887, which provides (s. 38) that the list shall consist of special and common, in the proportion of one special to two common jurors.

Where the list of assize required has to be compiled from separate rolls, as from the three districts of Edinburgh, the two districts of Lanark, or for sittings of the High Court at Edinburgh, or at any of the circuit towns, the proportions in which the jurors are to be taken from the different districts or counties are specified in the said Act (6 Geo. IV. c. 22, ss. 7 and 8); but these proportions have been considerably altered or modified by Acts of Adjournal, power to this effect being conferred on the High Court of Justiciary by sec. 8. Further, the distribution of the various counties to the different circuit districts has also been altered by Acts of Parliament and Orders in Council, in virtue of the powers conferred by the Acts 20 Geo. II. c. 43, s. 39; 9 Geo. IV. c. 29; and 27 Vict. c. 30. See CIRCUIT COURTS.

Number of Jurors to be cited.—Prior to the Act of 1579, c. 76, which limited the number of jurors to be cited for a criminal trial to 45, gross abuse of the power to cite an unlimited number was practised by officers of the law, who made up a numerous and unreasonable list of assize, and took money from the most substantial persons in the list to strike out their names.

By 3 Geo. IV. c. 85, s. 2, it was enacted that any number deemed

necessary, and directed by Act of Adjournal, should be cited for the High Court or circuit; and by the said Act 6 Geo. IV. c. 22, s. 15, it was declared lawful for the Lord Justice-Clerk or any Lord Commissioner of Justiciary to direct any number deemed necessary to serve at any criminal trial in the High Court or Circuit Court of Justiciary.

By Act of Adjournal, 22 June 1831, the Clerks of Court (High Court) are directed, when more than three cases are set down for trial on the same day before the High Court of Justiciary at Edinburgh, or where more than three prisoners are included in one indictment, to require the Sheriff to return a list of 65 persons. By the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35, s. 38), the minimum number of jurors to be returned in any list, whether for trials before the High Court or Sheriff Courts, is fixed at 30. One list of assize is sufficient for all cases set down for trial at one and the same diet (11 & 12 Vict. c. 79, ss. 4 and 5; 50 & 51 Vict. c. 35, s. 39).

The present practice of the High Court of Justiciary, for sittings at Edinburgh, is to require a list of 45 jurors, and, in terms of the said Act of Adjournal of 1831, 65 if there be more than three cases, or more than three persons charged in one indictment. And where a larger number than 65 is deemed necessary, such number as the Lord Justice-Clerk or any Lord Commissioner of Justiciary may direct. In the case of *Alex. M'Leod & Others* (1888, 1 White, 554), 120 jurors were cited.

Where a larger number than 45 is required for a sitting of the High Court on circuit, the Act of Adjournal appointing the circuit specifies the number which the Clerk of Court is to require the Sheriff to return.

The number of jurors in the respective lists of assize for the sittings of the High Court, and the relative proportions, are:—

I. Edinburgh.

City of Edinburgh	24
Town of Leith	6
County of Edinburgh	5
County of Linlithgow	3
County of Haddington	4
County of Peebles	3
	45

II. Circuits.

West

Glasgow—

Lanarkshire	80
Renfrewshire	17
Buteshire	3
	100

Stirling—

Stirlingshire	32
Dumbartonshire	19
Clackmannanshire	8
Kinross-shire	6
	65

Inveraray—

Argyllshire—	45

North	*Perth*—	
	Perthshire	33
	Fifeshire	32
		65
	Dundee—	
	Forfarshire	65
	Aberdeen—	
	Aberdeenshire	37
	Banffshire	14
	Kincardineshire	14
		65
	Inverness—	
	Inverness-shire	28
	Ross and Cromarty shire	13
	Elginshire	12
	Nairnshire	6
	Sutherlandshire	3
	Caithness-shire	3
		65
South	*Dumfries*—	
	Dumfriesshire	24
	Stewartry of Kirkcudbright	11
	Wigtownshire	10
		45
	Ayr—	
	Ayrshire	45
	Jedburgh—	
	Roxburghshire	23
	Berwickshire	13
	Selkirkshire	9
		45

The whole number of jurors in any list of assize need not be cited, but only such number, commencing from the top of the lists of special and common jurors respectively, as shall be sufficient to ensure a sufficient number for the trial of the cases which shall remain for trial at the date of the citation of the jurors. Such number is fixed by the Clerk of the Court in which the second diet is to be called, or in any case in the High Court of Justiciary, by the Clerk of Justiciary. Where jurors are not summoned, from the whole jurors in any list not being required, such jurors shall be placed upon the next list issued, until they have attended to serve (Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35, s. 39)).

Procedure for Procuring List.—Lists of assize are prepared under the direction of the Clerk of Justiciary, where the second diet is to be held in the High Court of Justiciary; and prepared by the Sheriff Clerk of the district in which the second diet for trial is to be held, where the second diet is to be held in the Sheriff Court. For trials before the High Court of Justiciary, the Clerk of Court issues a requisition to the Sheriff of the district in which the trial is to take place, calling upon him to furnish a list of assize. Where the trial is at any of the circuit towns, the Sheriff of the county in which that

town is situated, if there be more counties than one attached to that circuit district, procures from the other Sheriffs lists for their respective counties, and furnishes a complete list of assize for the circuit to the Clerk of Justiciary (Act of Adjournal, 3 Nov. 1887). The lists of assize are signed by the Sheriffs returning them (7 Geo. IV. c. 22, ss. 7 and 8).

The Clerk of Justiciary causes the list to be printed, and gets the principal list signed by one of the Lords Commissioners of Justiciary (11 & 12 Vict. c. 79, s. 4), and lodges it with the Sheriff Clerk of the district in which the second diet is to be held.

Directing Citation.—After the pleading diet, when the number of cases remaining for trial becomes known, the Clerk of the Court in which the second diet is to be held, or, where the second diet is before the High Court of Justiciary, the Clerk of Justiciary, fixes the number of jurors to be cited (50 & 51 Vict. c. 35, s. 39), and instructs the Sheriff Clerk of the district where the second diet is to be held to cite the jury. A warrant authenticated by the signature of the Clerk of Court, or a duly certified copy thereof, forms the authority for citing (50 & 51 Vict. c. 35, s. 23).

Manner of Citing.—Jurors were formerly cited by the macers of court, messengers-at-arms, or sheriff-officers. The citations were served on them personally, or left at their dwelling-places. By Act of Adjournal, 20 July 1674, the officer executing the citation was directed to exhibit a signed list of assize to each person cited; but it is doubtful whether this practice was followed. The officer made a written report or execution of the citation, which was sufficiently authenticated by his signature alone. By 11 Geo. IV. c. 37, s. 7, citation without any witness was declared to be good, and the oath of the officer sufficient to prove the citation if the same should be questioned in court.

By 31 & 32 Vict. c. 95, s. 10, it is enacted that this mode of citation be discontinued, and that the Sheriff Clerk of the county of Edinburgh, or his depute, where the trial is to take place before the High Court of Justiciary, or the Sheriff Clerk of the county in which any juror is to be cited, or his depute, where the citation is for a trial before a Circuit Court of Justiciary or before a Sheriff, shall fill up and sign a proper citation addressed to each such juror, and shall cause the same to be transmitted to him in a registered letter, directed to him at his place of residence as stated in the roll of jurors, and that a certificate under the hand of such Sheriff Clerk or his depute of the citation of any juror should have the like force and effect of an execution of citation according to the present law. The forms of warrant for, and of execution of, citation are now conform to Schedules B and E of the Act 50 & 51 Vict. c. 35.

By the Act of Adjournal of 3 Nov. 1887, the citations of all jurors to any circuit town are appointed to be made by the Sheriff Clerk of the sheriffdom in which such town is situated, whether such jurors reside in that sheriffdom or in any other sheriffdom of that district.

Inducia.—There is no fixed period of inducie for the citation of jurors in Scotland. Reasonable notice is all that is required. In England the minimum period of notice to which a juror is entitled, and without which no fine can be inflicted, is six days (33 & 34 Vict. c. 77, s. 20). In Scotland the practice varies, but generally the citations to jurors are despatched so that they will reach the jurors cited not later than six days before the day upon which they are called upon to serve. As has been said, the number of jurors to be cited is not fixed till after the pleading diet, which is generally held ten days before the diet of trial. For cases before the High Court, the Clerk of Justiciary, immediately on learning

from the Sheriff or Sheriffs the result of the pleading diet or diets, fixes the number of the jurors on the list to be summoned, and forthwith instructs the Sheriff Clerk to cite.

Penalty for Non-Attendance.—The fine or penalty inflicted upon a juror, duly cited, for failure to attend is 100 merks Scots (£5, 11s. $1\frac{4}{12}$d.).

Excuses.—A certificate by a duly qualified medical man, certifying on soul and conscience the inability of a juror to attend on account of illness, and specifying the nature of the illness, is received as an excuse for non-attendance. A certificate of birth or other satisfactory documentary evidence that a juror is either over the age of 60 years or under the age of 21 years, will entitle him to be removed from the list. Other excuses on special grounds may be considered by the Court before the trial; but as a rule jurors must state in Court their reasons for craving to be excused from serving. It is provided by 6 Geo. IV. c. 22, s. 19, that the several Courts shall respectively have power to excuse any one or more jurors from serving, the grounds of the excuse being stated in open Court. The question was raised though not decided in the case of *Bartlett* (H. C., Edinburgh, 1876, 3 Couper, 357), whether an alien was liable or competent to serve on a jury; but on the direction of the Court, intimation was made to the Sheriff Clerk of Midlothian that the Court recommended that aliens should not be summoned as jurors unless a very special occasion arose for it. Aliens who have been ten years domiciled in England are declared qualified and liable to serve on juries there, if otherwise qualified (33 & 34 Vict. c. 77, s. 8).

Civil Cases.

(1) *Court of Session.*—Lists of jurors for the trial of issues before the Court of Session are made up by the Sheriffs on precepts issued by the Clerk of Court (13 & 14 Vict. c. 36, s. 42) from the rolls made under the provisions of the Act 6 Geo. IV. c. 22, and the number to be cited is as specified in the Act 55 Geo. III. c. 42, s. 20, viz. not less than 36 or more than 50, one-third being special jurors (31 & 32 Vict. c. 100, s. 45). For the trial of issues at Edinburgh, the precept requires the Sheriff to make up, and the Sheriff Clerk to cite—

For the County of Edinburgh, including the City of Edinburgh	26
County of Haddington	5
County of Linlithgow	5
	36

For the trial of issues at circuit towns, the jury are chosen from the list summoned to attend the Court of Justiciary (31 & 32 Vict. c. 100, s. 46).

When an issue is appointed to be tried by a special jury (55 Geo. III. c. 42, s. 24; 13 & 14 Vict. c. 36, s. 42), the order for a special jury is transmitted to the Sheriff of the district from which the jury are to come, who forthwith returns a list of 36 persons qualified as special jurors (A. S. 16 Feb. 1841). This list is reduced to 20 by each party, in presence of the Clerk, striking off one alternately. The jurors are cited in the same manner as in criminal cases (31 & 32 Vict. c. 100, s. 47).

The penalty for failure to attend is not more than £5 and not less than £2 (55 Geo. III. c. 42, s. 22).

(2) *Sheriff Court.*—The only civil cases which require the citation of a

jury in the Sheriff Court are those under the Lands Clauses Act (8 & 9 Vict. c. 19) and the Fatal Accidents Inquiry (Scotland) Act (58 & 59 Vict. c. 36). Under the first-mentioned Act the number balloted to serve is 13. If neither party desire a special jury, the Sheriff summons a list of 25 persons qualified to act as common jurymen for the trial of civil causes in the Court of Session (s. 39). If a special jury is required (s. 53), the Sheriff nominates a list of 36 special jurors, which list is reduced by the parties to the number to be cited—20—in the manner provided for reducing special juries in the Court of Session.

Manner of Citing.—While it may be doubted whether the statutes introducing the system of citing jurors by registered letter—viz. Justiciary Act, 1868 (31 & 32 Vict. c. 95, s. 10), and Court of Session Act (31 & 32 Vict. c. 100, s. 47)—extend to the citation of jurors for the purposes of the Lands Clauses Act, the practice in some sheriffdoms is to cite these jurors by means of registered letter.

Penalty for Failure to attend, etc., is not to exceed £10; and in addition a juror failing to attend is liable to the same regulations, pains, and penalties as if such juror had been returned for the trial of a civil case in the Court of Session (s. 43).

In inquiries by Sheriff and jury under the Fatal Accidents Inquiry (Scotland) Act, 1895 (58 & 59 Vict. c. 36), the jury balloted to serve consists of 5 common and 2 special jurors (sec. 4, subs. 5). The Act directs that the Sheriff Clerk shall cite 10 common and 5 special jurors (subs. 4) from the Sheriff Court Book, in the manner provided by Statute for citation of jurors in civil cases (subs. 10). By the same subsec., the existing statutory provisions relative to fines for non-attendance of jurors are declared to apply to inquiries under the Act.

Citation on Summary Complaint.—This term expresses the legal process by which a person, charged with a crime or offence summarily punishable, is made aware of the charge against him, and summoned to appear before a Court, at a specified place and time, to answer to it. A charge duly made and signed by the prosecutor must be in existence when the accused person is cited (*Stewart*, 1894, 1 Adam, 493). The proceedings may be in writing or printed, or partly written and partly printed (27 & 28 Vict. c. 53, s. 17), and must be in the form provided by the Summary Jurisdiction (Scotland) Acts in all prosecutions under the provisions of those Acts (44 & 45 Vict. c. 33, s. 3). This article is restricted to procedure in such prosecutions. See also TWEED FISHERIES ACTS and POLICE PROSECUTION.

I. *WARRANT TO CITE.*—A regular warrant must precede citation (*Jameson*, 1849, J. Shaw, 238; *Stevenson*, 1857, 2 Irv. 592; *M'Lean*, 1895, 1 Adam, 564). The form is statutory (27 & 28 Vict. c. 53, ss. 6, 8, and Sched. C). The following is an example of a warrant to cite, containing special authority to sell game seized by virtue of an Act of Parliament:—

Inverness, 3rd August 1896.—The Sheriff-Substitute grants warrant to officers of Court to serve a copy of the foregoing complaint and of this deliverance upon Peter Gow, respondent, and to cite him to appear personally to answer thereto, within the Sheriff Court-House at Inverness, upon the 7th day of August current, at eleven o'clock forenoon, with certification; and also to cite witnesses or havers for both parties for all diets in the cause: And in the meantime grants warrant to sell the five hares mentioned in said complaint.

C. D.

The warrant to cite is signed either by a judge or the Clerk of Court, and the latter may sign it without its being laid before the former (*ib.* s. 21, and Sched. C). A vitiation in the date may be fatal (*Seaton*, 1867, 5 Irv. 354). The place and time at which the respondent is required to appear must be correctly stated (*Waddell*, 1857, 2 Irv. 611). When the proceedings are under an Act which necessitates the complaint being made upon oath, the warrant should mention the oath.

II. *Citation.*—A full copy is made of the complaint, oath of verity (if any), and warrant of citation (27 & 28 Vict. c. 53, s. 6). Trivial discrepancies in the copy are immaterial, but errors which tend to mislead may invalidate the proceedings (*Waddell*, 1857, 2 Irv. 611; *Chalmers*, 1871, 2 Coup. 164; *Armstrong*, 1892, 3 White, 373; *Stewart*, 1894, 1 Adam, 493). A citation in the statutory form is written at the end of the copy (27 & 28 Vict. c. 53, ss. 6, 8, and Sched. F (1)), *e.g.*—

To Peter Gow, labourer, 157 Napier Street, Inverness: Take notice, that you are required to appear personally at the place and time specified in the warrant, of which the foregoing is a copy, to answer to the complaint to which this notice is attached, with certification. This I do on the 3rd day of August 1896 years.

Will. Ferguson,
Police Constable of Inverness-shire.

The copy with the citation annexed is handed for service to a competent officer of the law (*ib.* ss. 8 and 9). See Apprehension of a Criminal and Backing a Warrant. The officer signs the citation, dates it, initials any alterations on the copy, and delivers it to the respondent personally; but if, *on search*, the respondent cannot be found, the officer may leave it at his usual place of abode (*ib.* s. 6). The ordinary rules as to domicile apply to such citations. The officer need not have the principal complaint and warrant in his possession at the time of citation (9 Geo. iv. c. 29, s. 7). In a complaint for an offence at common law, or for a contravention of a Statute which contains no provision as to the period of notice, citation must be made not less than forty-eight hours prior to the time fixed for the respondent's appearance before the Court (27 & 28 Vict. c. 53, s. 6); but in a complaint for a contravention of a Statute which prescribes a longer period (*e.g.* Sale of Food and Drugs Act Amendment Act, 1879, and the Public Houses Acts), the full statutory notice must be given (*Dunlop*, 1895, 1 Adam, 554; *Laird*, 1895, 2 Adam, 18; *Registrar of County Court, Leeds*, 16 Q. B. D. 691). If, by mistake, too short notice has been given to the respondent, the defect cannot be cured by an adjournment, because it is the duty of the judge in such circumstances to dismiss the complaint *de plano*; but if the respondent does not press his right, and an adjournment is granted, his objection in a subsequent appeal may be too late (*Dunlop* and *Laird*, *supra*). An irregularity or informality in the citation, which has caused no actual prejudice to the respondent, is not material, if he appears and pleads at the proper place and time (*Stewart*, 1891, 2 White, 627; *Armstrong*, 1892, 3 White, 373; *Spowart*, 1895, 1 Adam, 539; *Dunsmore*, 1896, 4 S. L. T. No. 207).

III. *Proof of Citation.*—The officer writes an execution of citation upon the complaint or a separate paper. No statutory form is provided, but it may be in the following terms:—

Upon the 3rd day of August 1896 years, I lawfully cited and required the before-designed Peter Gow, respondent, to appear personally, at the place and time specified in the foregoing warrant, to answer to the foregoing complaint, with certification. This I

did by delivering a full copy of the foregoing complaint and warrant, with a just copy of citation and requisition thereto annexed, to the said respondent personally.

WILL. FERGUSON,
Police Constable of Inverness-shire.

This execution, if *ex facie* regular and subscribed by the officer, is sufficient proof of citation; but the officer may be called to support it by his oath. The complainer lodges the complaint and execution of citation with the Clerk of Court previous to the hearing. See CRIMINAL PROSECUTION (SUMMARY).

Civil Imprisonment.—See IMPRISONMENT FOR DEBT; DILIGENCE (AGAINST THE PERSON).

Civil Law.—This expression serves, according to the context, either (1) to distinguish a particular department of law from other departments—*e.g.* criminal or ecclesiastical law, in which case its exact import depends upon the term to which it is opposed; or (2) to denote the Roman law as a whole.

The origin of the epithet *civil*, as applied to Roman law, is not older than the Middle Ages. The Roman lawyers understood by *jus civile*, not their positive law as a whole, but only some ingredient or factor of it. They used the term most frequently, (1) for the law peculiar to a particular State and confined to its citizens (*jus proprium civitatis*), in contrast to the other element in every system which they held to be based on natural reason and to be common to mankind in general (*jus gentium*), and (2) for the portion of their law which was based on custom or statute, especially the ancient law of the XII. Tables and its *interpretatio*, as opposed to the rules established by the prætor's edict (*jus honorarium*); see *Inst.* i. 2. 1, 2. But when the study of the Roman law revived in the universities of Northern Italy in the eleventh and twelfth centuries, the school of the glossators gave to Justinian's law-books the title *Corpus Juris Civilis*; and the name "Civil Law" became current for the Roman system in its entirety as received throughout the larger part of mediæval Europe. This designation served to distinguish it as the secular law from the law of the Church, which, under the name of the Canon law, had now become a distinct, and in some respects antagonistic, system.

The development, remains, and present authority of the Roman law are briefly dealt with under that heading.—See ROMAN LAW.

Civil List.—In feudal times superiors and vassals were bound by mutual ties. The vassal owed his superior military or other services and feudal dues, while the superior owed his vassal protection: and the cost of this protection formed a burden on the estates of the superior. On the same principle, from the earliest period down to about the time of Edward I., the cost of the defence of the realm, and of all other public business, was defrayed out of the royal revenues, except where partly borne by such taxes as Danegeld, scutage, and carucage, levied for special purposes. These royal revenues were mainly derived from the rents of the *terra regis*, once the folkland, and from fines, forfeitures, and the various feudal dues. But soon the question inevitably arose, how far the so-called Crown property was held in trust for the public service, and how far for the personal use of the

reigning sovereign. This question assumed an acute form in England in the reign of Henry III., who squandered the revenues of the Crown on his household and on his foreign favourites, and who appropriated to similar purposes the subsidies he periodically obtained for the defence of the realm. Hence the frequent petitions of Parliament, both in England and Scotland, "that the king would live of his own," and hence the frequent revocations of the king's too lavish grants of Crown property. Hence also arose the necessity for the "appropriation of supply" to specific purposes. This practice of distinguishing property held by the Crown in trust for the public, from revenues set apart for the maintenance of the sovereign, has become firmly established since the Revolution of 1688–89, and has been carried out by a series of statutes. By the last Civil List Act, 1 & 2 Vict. c. 2, the sum of £385,000 per annum is settled on Her Majesty for life, in consideration of her surrendering for life all her hereditary revenues to the Consolidated Fund; and by the Schedule to the Act this sum is further appropriated for the Privy Purse (£60,000), the royal household salaries, etc. (£303,760), the royal bounty, alms, and special services (£13,200), and pensions to persons distinguished in science, literature, and arts who "have merited the gratitude of their country" (£1,200), leaving a balance of nearly £7,000 unappropriated. These details will necessarily require periodical readjustment, but the appropriation itself rests on sound constitutional principle. [See Wharton's *Law Lexicon*; the standard constitutional histories, etc.]

Civil Process, Abuse of.—*Litigation.*—A person has a right to bring before a Court for decision any claim which he thinks he has, however unfounded his claim may in reality be. Litigation, therefore, being a right, an unsuccessful litigant is not liable in damages because his case turns out to be bad. The only liability he incurs is having to pay the expenses of his opponent (*Kennedy*, 1877, 5 R. 302), which are not now regarded as damages or awarded as a penalty. The right to raise an action necessarily involves the right to take all steps incidental to its progress, including that of interim execution pending appeal (*Graham*, 1829, 7 S. 876; *Cleland*, 1848, 10 D. 924). The privilege also extends to taking decree by recording, as in the case of bills and bonds (*Gardner*, 1864, 2 M. 1183). But if it is clear that a party knows that his action is groundless, a claim of damages will lie against him, as, for instance, in taking decree after payment has been made. It must appear, however, that the act was not merely negligent, and therefore the injured party must prove that decree was taken maliciously (*Rhind*, 1893, 21 R. 275),—as, for instance, that the party taking the decree knew that the debt had been paid (*Ormiston*, 1866, 4 M. 488; as to retention of a cheque being equivalent to payment, see *Macdougall*, 1893, 21 R. 144). If, also, a contract has been entered into between opposing litigants (or between a creditor using diligence and his debtor), to delay proceedings for a certain time, an action will lie against the pursuer for taking decree before the time has elapsed. But the wrong in this case does not consist in pursuing an action known to be groundless, but in going on with proceedings in face of the contract, and therefore the party aggrieved requires to allege that the decree was taken in breach of the contract, and does not require to allege malice (*MacRobbie*, 1891, 18 R. 470). The construction of the contract, if ambiguous, is for the judge at the trial (*Welsh*, 1890, 18 R. 109), but it is to be observed that an intimation that, failing a settlement within a

specified time, proceedings will be taken, does not import an obligation to abstain from proceedings until the expiry of that time (*Mackersy*, 1895, 22 R. 368), and that the ordinary rules as to the incompetency of modifying a written agreement by parole apply in this connection (*Turnbull*, 1891, 19 R. 154).

Interim Interdict.—(1) *Continuing Possession.*—Where a person in possession upon an apparently sufficient title is interfered with in the enjoyment of his property, he is entitled to apply for interdict to stop the interference, and will not be liable in damages although his title is ultimately found to be bad, unless he has acted maliciously and without probable cause (*Glasgow City Railway*, 1885, 12 R. 1287; *Buchanan*, 1853, 15 D. 365; *Kennedy*, 1877, 5 R. 302). Since the remedy is granted *ex parte*, however, a general averment is sufficient. A person who claimed an exclusive right of ferry, and protected this right by interdict for two years, until his adversary succeeded in a declarator, was found not liable for the loss caused to the adversary by preventing his carrying passengers, as he was not shown to have acted in *mala fide* (*Moir*, 1832, 11 S. 32).

(2) *Inverting Possession.*—Where the effect of interdict is to invert possession (*Jack*, 1875, 3 R. 45), the petitioner is held to make his application *periculo petentis*, and is liable for the damage which his interdict has caused, if it has been obtained wrongfully, and no inquiry is required into the *mala fides* or *bona fides* of the application (*Kennedy, supra; Wolthekker*, 1862, 1 M. 211; *Glasgow City Railway, supra*). On this ground, a petitioner who had interdicted a liquidator from selling certain articles included in the estate under his charge, was held liable in damages where it turned out that the articles belonged to the estate and not to the petitioner (*Fife*, 1895, 23 R. 8); and also a body of Police Commissioners, who had prevented a man from building on his own ground, in contravention of an *ultra vires* order pronounced by them (*Kennedy, supra*).

Interdicts interfering with rights arising under contract fall under the same rule (*Abel's Exrs.*, 1863, 1 M. 1061; *Reid*, 1855, 17 D. 1100). Interdicts preventing a contractor from removing his plant at the end of the contract (*Robinson*, 1864, 2 M. 841), preventing a mineral tenant from doing the like on the expiry of his lease (*Gilmour*, 1857, 29 S. J. 411), and depriving a tenant farmer of possession under his lease (*Miller*, 1865, 3 M. 740), have all been held actionable merely because wrongful.

Diligence.—A creditor using diligence is bound to see that it is regular and regularly executed. If the diligence is bad, and open to reduction upon the ground of irregularity, the creditor is liable on that account alone, and no proof of malice or wrongful motive is required (*Gibb*, 1873, 11 M. 705; *MacRobbie*, 1891, 18 R. 470). But where the diligence itself is regular, though proceeding upon a decree which turns out to be subject to reduction, the creditor will not be liable because the diligence is thereby invalidated (*Keene*, 1875, 12 S. L. R. 308; *Bell*, 1859, 21 D. 1008; *Aitken*, 1837, 15 S. 683), unless the decree has been plainly irregular, as, for instance, from having been pronounced by an incompetent Court, or from being *ultra petita* and disconform to the conclusions of the summons (*Wilson*, 1846, 9 D. 7; *Garrioch*, 1851, 13 D. 1337). Where decree and diligence are both regular, the creditor incurs no liability for the damage done to the debtor. There is no action for oppressive use of diligence, and a creditor may proceed by way of diligence, although there is another way open to him which would be less injurious to the debtor (*Johnston*, 1858, 20 D. 790).

For trifling inaccuracies in the execution of diligence, which plainly can cause no loss to the debtor, no damages can be recovered (*Beattie*, 1844, 6 D. 1093; *Henderson*, 1871, 10 M. 104). Where the mistake is plainly apparent to the debtor on the face of the papers, it may not even invalidate the diligence, as where a mistake in a date in the execution was obvious by reference to the decree (*Henderson, supra; Gordon*, 1848, 10 D. 1129). A trifling misnomer, also, in the designation of the debtor will not subject the creditor to damages (*Spalding*, 1883, 10 R. 1092; *Cruickshank*, 1888, 15 R. 326), although the diligence may in consequence be suspended (*Brown*, 1884, 12 R. 340). But a charge against the wrong person, or against a person in the wrong capacity, for instance, against a person as an individual instead of against him as a trustee, is bad and actionable (*Campbell*, 1844, 6 D. 1030; *Forbes*, 1844, 6 D. 1113).

Where the amount decerned for is not all due at the time of giving a charge, the charge must be accordingly restricted (*Dick*, 1845, 8 D. 1); and where a tender is made of the sum due, the creditor may not proceed further with his diligence. A tender may be made to the agent or his clerk, but apparently not to the messenger, as he has no authority to receive money (*Inglis*, 1862, 24 D. 544). The debtor making a tender cannot demand delivery of the extract decree (*Inglis, supra*). A sist of diligence stays all proceedings, and also renders a creditor going on with his diligence, after he has knowledge of the sist, liable in damages. Formal certioration of the creditor is not necessary (*Ritchie*, 1849, 11 D. 882). An agreement, also, not to take proceedings for a certain time, is binding on the creditor, and if he proceeds in breach of it, he is liable (*Mackersy*, 1895, 22 R. 368; see cases cited above under *Litigation*).

Personal Diligence.—Meditatione Fugæ Warrant.—The warrant being a remedy of an exceptional nature in favour of the creditor, and being obtainable, as a matter of course, on an *ex parte* statement by him, he is held liable to the debtor if it should be wrongful, and neither malice nor want of probable cause require to be shown (*Ford*, 1858, 20 D. 949; *Swayne*, 1835, 13 S. 1003). Both creditor and his law agent come under this rule, but the magistrate who grants the warrant is privileged, and against him malice and want of probable cause must be established (*Carne*, 1851, 13 D. 1253), unless the proceedings have been grossly irregular (*Laing*, 1791, 3 Pat. App. 219).

The debt on which the creditor proceeds must exceed £8. 6s. 8d. (*Marshall*, 1844, 7 D. 232), and be specific (*Pratt*, 1826, 4 S. 780 or 788) not random (*Campbell*, 1847, 20 S. J. 30), or contingent, except in the case of a claim for inlying expenses and aliment by the mother of an illegitimate child still *in utero* (*Davies*, 1861, 23 D. 532). The debt must be one for which imprisonment is competent, and as these are of only two kinds, *e.g.* (1) taxes, fines or penalties due to the Crown, and rates and assessment, and (2) sums decerned for aliment (43 & 44 Vict. c. 34, s. 4), it follows that the warrant is competent only in these two instances (*Hart*, 1890, 18 R. 169). The amount, kind, and resting owing of the debt need not be the occasion of a mistake on the creditor's part, as they can be ascertained definitely, and his liability for an error on these grounds is absolute; but, with regard to the intention to abscond, there cannot be the same certainty, and a creditor will not be liable merely because he has entertained a mistaken belief on that point. If his belief was reasonable, he will escape liability (*Ford*, 1858, 20 D. 949), and he does not require to show what reason the debtor had for meditating flight (*Jackson*, 1865, 4 M. 72). Cases where it appears the belief was held not to be reasonable, were where a

debtor was moving from one part of Scotland to another (*Laing*, 1789, Mor. 8555), and where an officer was going to join his regiment (*Scot*, 1744, Mor. 8549). Since the decision in *Hart* (*supra*), it may be doubted whether a warrant to apprehend on an alimentary debt is still competent, as imprisonment is no longer an absolute right, as explained below.

Civil Imprisonment.—As imprisonment is the most severe form of diligence, a creditor is liable, if his procedure is irregular or subject to reduction (*McIntosh*, 1883, 11 R. 8); but if the diligence is valid, an action will not lie against him on account of oppression or malice (*Cameron*, 1872, 10 M. 461). As, however, imprisonment for debt has been abolished, with the exceptions above mentioned (43 & 44 Vict. c. 34, s. 4), the older cases show a different state of facts from those which may arise hereafter. Imprisonment for alimentary debt, one of the surviving class, has been altered so that it is no longer to be used as a right by the creditor, but is only available where the Sheriff is satisfied of the wilful failure of the debtor to pay (45 & 46 Vict. c. 42). Consequently, until the debtor has had an opportunity of satisfying the Sheriff of his inability to pay, the Sheriff has no power to grant a warrant to apprehend, and the creditor must be satisfied with giving a citation. A law agent was held liable in damages who presented a petition to the Sheriff to grant a warrant to commit a debtor to prison, and upon that obtained and executed a warrant to apprehend the debtor and bring him up for examination (*Cook*, 1889, 16 R. 565). Imprisonment upon decrees *ad factum præstandum* has not been affected by the Debtors Act of 1880, and is still competent (*Mackenzie*, 1883, 10 R. 1147).

Process-caption.—This is a diligence directed against the person, not for recovery of a civil debt, but for vindicating the power of a Court of law over the documents in its possession. If a borrower of numbers of process does not timeously return them, a warrant may be obtained, either by a party to the cause, or by the Clerk of Court, or may be issued by the Court *ex proprio motu*, ordaining the borrower to return them, or, in the event of failure, for his incarceration (*Stair*, iv. 47. 23; *Watt*, 1873, 11 M. 960). The judge who grants the warrant has judicial or absolute privilege, as it is an act *intra vires* of the Court, and necessary for the proper conduct of its business (*Watt*, 1870, 8 M. (H. L.) 77), but the Clerk of Court, or other person using a caption, is liable in damages as in the ordinary case of wrongful diligence, if the warrant is subject to reduction on any ground (*Watt*, 1868, 6 M. 1112; 8 M. (H. L.) 83; *Hunter*, 1842, 4 D. 1175). Bad faith on the part of the person using the caption, as proceeding in the knowledge that it was illegal, may be averred in order to aggravate the damages (*Hunter*, 1842, 4 D. 1175). The messenger who executes the warrant, however, being bound by his office to execute an *ex facie* regular warrant, may not be liable in a case where his employer is. But an innocent principal is liable for the mistake of his law agent (*Pearson*, 1833, 11 S. 1008).

It has been the practice to give twenty hours' notice of the intention to apply for caption; but when a process has been removed illegally, instead of being borrowed, a caption is not invalid from want of notice, as the possession of the process has been illegal from the first, and there is no need to certiorate the person who has removed it of his illegal detention (*Watt*, 1874, 1 R. (H. L.) 21). In such a case, it is not necessary to proceed by caption at all, and the judge may issue a summary warrant ordering the party to restore the process, and for imprisonment in case of failure, or may commit for contempt of Court (*Watt*, *supra*, 11 M. 964). Returning the process after the issue of the warrant will not make its subsequent execution wrongful

when the party using the warrant is not informed of that fact (*Pearson*, 1833, 11 S. 1008).

Arrestment.—Arrestment on the dependence of an action, and arrestment *ad fundandam jurisdictionem*, are of the nature of diligence, and are subject to the ordinary rules as to regularity of procedure, and may also become the ground of an action although the procedure has been regular. But the pursuer of an action using arrestment is not liable in damages because the arrestment has fallen with an action which has failed. A pursuer has a right to use arrestment as a matter of course, and without any special application to the Court, and the privilege he enjoys in raising an action extends to the use of arrestment in connection with it. He may be held liable, therefore, only if he is shown to have acted maliciously and without probable cause (*Wolthekker*, 1862, 1 M. 211). No averments short of these, such as having acted injuriously and oppressively, will suffice, and it is not enough to show that the arrester admitted the unfounded nature of his action by abandoning it (*Brodie*, 1851, 13 D. 737). The privilege, however, is not of the order which requires special facts instructing malice to be set forth; a general averment is sufficient (*Baillie*, 1853, 16 D. 161). This averment may relevantly be made against any *persona* which can use arrestments, such as a company (*Gordon*, 1886, 14 R. 83).

Privilege is lost when the proceedings are irregular, and the injured party can recover damages without establishing either malice or want of probable cause. A trifling irregularity would probably not be held wrongful and actionable, but such an irregularity as arresting without warrant clearly will (*Meikle*, 1862, 24 D. 720). Where, in an action against a person *quâ* executor, his private funds were arrested, it was held to be arrestment without warrant, and to render the arrester liable. Such wrongful arrestment gives a right of action without actual damage being shown (*Meikle*, *supra*; *Borthwick*, 1863, 2 M. 125).

Inhibition.—Inhibition, the process of attaching the heritage of a defender on the dependence of an action, being an arrestment in the ordinary right of a pursuer, is privileged to the extent of requiring malice and want of probable cause to be established (*Kinnes*, 1882, 9 R. 702; *Wolthekker*, 1862, 1 M. 211: *Beattie*, 1880, 7 R. 1171). As execution of inhibition affects the whole heritage of the defender, and it is competent for the defender to have it restricted, there is no action for oppressive use in respect of the amount of property affected. When a defender who might have had the inhibition restricted to the subject of the litigation, did not enter appearance, and had subsequently to incur expense in clearing the record, he was held not entitled to recover this expense from the original pursuer (*Macleod*, 1836, 15 S. 248).

Poinding—Personal.—Poinding, as the next step in diligence after the expiry of a charge, is subject to the same rule as the charge in respect of regularity of proceedings. A poinding, for instance, is wrongful if there is a mistake in the date of the charge (*Beattie*, 1844, 6 D. 1088), and gives a right of action although no actual damage has been sustained (*Beattie*, 1846, 8 D. 930). But if the proceedings have been regular in form, the poinding creditor is not necessarily liable in damages because the poinding may be bad. Something more than a mere mistake is required, such as a reckless disregard of the debtor's interests. Thus poinding largely in excess of the amount of the debt (*M'Kinnon*, 1866, 4 M. 852), and appraising improperly by guessing at values and slumping a great number of articles (*Le Conte*, 1880, 8 R. 175), selling articles largely in excess of the debt, or intentionally attaching such conditions to the sale, or conducting it in such a way,

as to deter buyers (*Robertson*, 1857, 19 D. 1016), have been held to be oppressive and actionable. But if the way in which the sale is conducted has been allowed by the judge of the roup, without remonstrance by the debtor, the latter may be barred from afterwards questioning it (*Kennedy*, 1887, 15 R. 118).

Poinding the Ground.—The only specialty of this form of diligence is that goods of third parties on the debtor's lands are apt to be included in the poinding. Originally the poinding attached all the goods on the lands, and though this rule has been altered, no action will lie merely on account of third parties' goods being poinded (*Nelmes*, 1883, 10 R. 890). He can get them withdrawn by applying to the Court (*Lindsay*, 1872, 10 M. 708), and the poinding creditor has no sure means of distinguishing what belongs to the debtor and what does not (*M'Lauchlan*, 1895, 23 R. 126).

Sequestration.—As sequestration differs from both litigation and diligence, having the appearance of the former and the effect of the latter, neither of the general rules previously laid down for those proceedings are altogether applicable. A petition for sequestration, although followed by diligence of the most sweeping kind, is not in itself diligence, but is rather a judicial proceeding like an ordinary action. The prayer of the petition is not granted as a matter of course, but only after intimation to the bankrupt, who may appear and oppose. Consequently, a person complaining of having been illegally sequestrated must show that it was done maliciously and without probable cause (*Kinnes*, 1882, 9 R. 698). If, however, the sequestration is bad from having proceeded on a false statement in the petition, the petitioner is not privileged, but is liable just as in the case of warrants granted on special application. Thus, if an award is bad on the merits, as where the debt is fictitious, or notour bankruptcy does not exist (*Kinnes, supra*, 702, 704), or there is an expired charge of six days when it should be fifteen (*Smith*, 1882, 10 R. 291), an action will be allowed on the averment that the sequestration was wrongful and without averments of malice and want of probable cause. It has been suggested that in applications for *cessio*, which is the substitute for imprisonment or poinding, the rules applicable to diligence should apply (*Smith, supra*, 298).

A trustee in a sequestration is privileged while acting as such. But if he exceeds his powers, as by causing an auctioneer, without warrant or judicial authority, to enter the house of the father of the bankrupt and inventory the furniture and effects therein, the irregularity destroys the privilege (*Houldeu*, 1871, 9 S. L. R. 169). A trustee, or judicial factor on a bankrupt's estate, is entitled by virtue of his appointment to enter and ransack the bankrupt's house and lockfast places therein, and no action will lie against him at the instance of the bankrupt's wife on the allegation that he wrongfully and without warrant forced open the door of a room which was locked and examined the effects therein, although informed that the effects in that room belonged entirely to her (*M'Lauchlan*, 1895, 23 R. 126).

Landlord's Sequestration.—This being a remedy granted by the Court on a special application, the applicant is held to apply at his own risk, and to guarantee the facts on which he grounds his application (*M'Laughlan*, 1892, 20 R. 41, 45). It thus differs from mercantile sequestration in being a diligence granted entirely on an *ex parte* statement, and consequently, to sustain an action, it is not necessary to set forth malice and want of probable cause (*Watson*, 1878, 5 R. 843; *Wolthekker*, 1862, 1 M. 211). An action may also be maintained on the ground that the sequestration, though not wrongful and not subject to reduction, has been oppressively used (*M'Leod*, 1829, 7 S. 396), as where the sale under the

sequestration is misconducted, and goods in excess of the creditor's requirements are sold (*Robertson*, 1857, 19 D. 1016), or a warrant to carry back furniture removed by a tenant is executed without cause (*Gray*, 1891, 19 R. 25; contrast *M'Laughlan*, 1892, 20 R. 41). But it is not necessary to show that sequestration has been used oppressively if the award itself has been illegal (*Miller*, 1834, 13 S. 699). If the landlord has not given entire possession before applying for this remedy (*Graham*, 1843, 5 D. 1211; *Cummings*, 1880, 17 S. L. R. 463; *Munro*, 1888, 16 R. 93), or has disallowed a proper deduction from rent (*Oswald*, 1851, 13 D. 1229), the sequestration is bad, and the landlord will be liable.—[Glegg, *Reparation*, 162–192.]

Claim.—In actions of multiplepoinding, the document by which a party interested in the distribution of the fund *in medio* sets forth his right and demands a ranking is known as a condescendence and claim. If there is any objection to the competency of the action, defences are lodged in the ordinary way; but if there is none, a condescendence and claim may be lodged by any of the parties called as defenders, or by anyone, even although not called, who alleges an interest in the distribution of the fund. It contains a statement of the grounds upon which the interest alleged is based, and is followed by a specific claim to the whole or a definite part of the fund *in medio*. It concludes with a note of the appropriate pleas in law. A record is made up on the summons, with its condescendence, and the various claims lodged, and the case thereafter proceeds in the ordinary way. Creditors of claimants may lodge claims upon their claims, and so obtain payment of their debtors' shares of the fund. Such claims are called "riding claims."

See Multiplepoinding; Notice of Claim; Franchise.

Clandestine Marriage.—See Marriage.

Clare constat, Writs and Precepts of.—One of the modes competent to an heir for completing a title to lands in which his ancestor died infeft, is by infeftment in virtue of a precept or writ of *clare constat*, granted by the superior of the lands. The precept or writ of *clare constat* is so called because, as will appear from the forms hereinafter given, it sets forth that "it clearly appears" (*clare constat*) to the granter that the grantee is the heir of the last vassal. When a proprietor dies infeft in land, his heir-at-law, or of provision, or of tailzie and provision, can, since the commencement of the Conveyancing Act, 1874, make up a title by recording in the appropriate register of sasines (1) an extract decree of special service, (31 & 32 Vict, c. 101, s. 46), or (2) a notarial instrument, proceeding on an extract decree of general service (37 & 38 Vict. c. 94, s. 31), or (3) a writ or precept of *clare constat* (31 & 32 Vict. c. 101, s. 101). Writs of *clare constat* were introduced by the Titles to Land Act, 1858 (21 & 22 Vict. c. 76, s. 11); and the only material difference between a writ of *clare constat* and a precept of *clare constat*, in their present form, is that the precept contains a precept of sasine, whereas the writ does not. The writ of *clare constat* can be recorded, or a notarial instrument can be expede on it and recorded (31 & 32 Vict. c. 101, s.101; and see ss. 17 and 3); whilst a precept of *clare constat* can either be recorded, or a notarial instrument can be expede on it and recorded, or an instrument of sasine, in the old form, on account

of the precept of sasine contained in the precept of *clare constat*, can be expede and recorded.

Sec. 101 of the Titles to Land Consolidation Act, 1868,—this section re-enacts, with variations, the provisions of sec. 11 of the Act of 1858,—enacts that precepts of *clare constat* may be in, or as nearly as may be in, the form given in Schedule (W), No. 2, annexed to the Act: and that in all cases in which it is or may be competent to grant precepts of *clare constat*, it shall be competent and sufficient to grant a writ of *clare constat* in, or as nearly as may be in, the form given in Schedule (W), No. 1, annexed to the Act, and to record such writ of *clare constat*, with a warrant of registration thereon, in the appropriate register of sasines. It shall be competent, the section also provides, so to record any precept of *clare constat*, with warrant of registration thereon; and such writ of *clare constat*, or precept of *clare constat*, being so recorded, shall have the same legal force and effect in all respects as if a precept of *clare constat* had been granted, and an instrument of sasine thereon had been expede in favour of the person on whose behalf such writ or precept of *clare constat* and warrant of registration are presented for registration, and recorded, at the date of recording the said writ or precept and warrant, according to the law and practice in force prior to the 1st day of October 1858. The section further provides, that subject-superiors shall be bound to grant such writs of *clare constat*, if required by the heir entitled to demand the same: provided always that the heir shall, if required, produce a charter or other writ showing the *tenendas* and *reddendo* of the lands in which his ancestor died infeft: and shall also, at the same time, pay or tender to the superior such duties or casualties as he may be entitled to demand.

Schedule (W), No. 1, of the Act of 1868, giving the form of writ of *clare constat* by a subject-superior, is in these terms:—

I, *A. B.* [*insert name and designation of superior*]: Whereas, by decree of general service [*or* of special service, *as the case may be*] of *C. D.* [*here insert the name and designation of the heir*], dated [*here insert the date of the decree*], and recorded in Chancery [*here insert the date of registration*], and other authentic instruments and documents [*or* by authentic instruments and documents], it clearly appears that *E. F.* [*here insert the name and designation of the ancestor*] died last vest and seised as of fee in [*here describe the lands, or refer to them as in Schedule* (E) *or Schedule* (G), *as the case may be*], and that in virtue of [*here describe the charter or precept and sasine, or recorded charter or precept, or other writ or other deed or conveyance forming the last investiture, by dates, and dates of registration in the Register of Sasines; and where the lands are held under a deed of entail, here insert the destination, conditions, etc., at full length, or refer to them in or as nearly as may be in the form of Schedule* (C), *or if desired refer to them as follows*, but always with and under the conditions, provisions, and prohibitory, irritant, and resolutive clauses (*or* clause authorising registration in the Register of Tailzies, *as the case may be*) contained in a deed of entail granted by *G. H.* (*here name and design the grantor*), dated the day of in favour of *I. K.* (*here set forth the destination or such part thereof as may be deemed necessary, or say*, and the heirs therein specified), and which conditions, provisions, and prohibitory, irritant, and resolutive clauses (*or* clause authorising registration in the Register of Tailzies, *as the case may be*) are herein referred to as at length set forth in the said deed of entail, which is recorded in the Register of Tailzies on the day of (*or as at length set forth in the above-mentioned recorded charter, etc., forming the last investiture, or as at length set forth in any other recorded deed or conveyance. And in every case where there are any real burdens, conditions, provisions, or limitations proper to be inserted or referred to, insert them here, or refer to them in or as nearly as may be in the form of Schedule* (D)]; and that the said *C. D.* [*or if the heir has not been previously named here, say*], and that *C. D.* [*here insert his name and designation*] is eldest son and nearest lawful heir of the said *E. F.* [*or whatever relationship and character of heir the party holds, here state it*]: Therefore, I hereby declare the said *C. D.* to be the heir entitled to succeed to the said *E. F.* in the said lands, to be holden of me and my successors in manner and for payment of the duties specified in the [*here specify, or refer to if previously specified, a charter or other writ containing the tenendas and reddendo. If the reddendo is different from that in the charter or other writ*

specified or referred to, or if the vassal should desire, specify the reddendo here]. IN WITNESS WHEREOF [*insert a testing clause in usual form*].

Schedule (W), No. 2, of the Act gives the form of a precept of *clare constat* by a subject-superior, and is as follows:—

I, *A. B.* [*here insert name and designation of superior*]: Whereas, *etc.* [*as in* No. 1 *of this Schedule*] it clearly appears that *E. F.* [*here insert the name and designation of the ancestor*] died last vest and seised as of fee in, *etc.* [*as in* No. 1 *of this Schedule down to and including the statement of the relationship and character of heir which the party holds*]; and that the said lands and others are holden of me and my successors, as superiors thereof, in free blench farm [*or* feu farm, *as the case may be*] for ever, for payment of [*here specify the reddendo*]: Therefore I desire any notary public to whom these presents may be presented to give to the said *C. D.*, as heir aforesaid, sasine of the lands and others above described. [*If there are conditions of entail, etc., or other burdens or qualifications, here add,* but always with and under the conditions, provisions, and prohibitory, irritant, and resolutive clauses (*or* clause authorising registration in the Register of Tailzies, *or* with and under the real burdens, conditions, provisions, and limitations, *as the case may be*) above specified, *or* referred to, *as the case may be.*] IN WITNESS WHEREOF [*insert a testing clause in usual form*].

It may be noted that for Schedule E referred to in these forms, Schedule O of the Conveyancing Act, 1874 (s. 61), has been substituted.

The Titles to Land Act, 1868, sec. 102 (re-enacting, with variations, sec. 7 of 23 & 24 Vict. c. 143), also makes it competent for the heir of any person who died last vest and seised in any lands held *burgage*, to obtain from the magistrates of the burgh within which the lands are situated, a writ in, or as nearly as may be in, the form given in Schedule (W), No. 3, annexed to the Act. Such writ of *clare constat* may be signed by the Provost or acting chief magistrate for the time, and by the town clerk, or, where there are more than one town clerk, by one of the town clerks, and when so signed shall be as valid as if signed by the whole of the magistrates; may, with warrants of registration thereon in favour of such heir, be recorded in the appropriate register of sasines; and when so recorded has, according to the Act, the same effect in all respects as if, at the date of such recording, cognition and entry of such heir had taken place in due form, and an instrument of cognition and sasine in regard to such lands and in favour of such heir had been expede and recorded according to the law and practice in force prior to the 1st day of October 1860. Although sec. 25 of the Conveyancing Act, 1874, enacts that there shall not, after the commencement of the Act, be any distinction between estates in land held burgage and estates in land held feu in so far as regards the conveyances relating thereto, or the completion of titles, or of any of the matters or things to which the provisions of the Act relate, it is still considered competent to use the form of writ of *clare constat* supplied by Schedule (W), No. 3, of the Act of 1868, in the case of subjects held burgage, because by sec. 26 of the later Act it is provided that "conveyances of land" theretofore held burgage may be in the forms allowed by the Act of 1861 in regard thereto, the word "conveyances" here including, it is thought, writs of *clare constat*.

Re-enacting, with variations, secs. 18 and 19 of the Crown Charters Act, 1847 (10 & 11 Vict. c. 51), and sec. 11 of the Titles to Land Act, 1858 (21 & 22 Vict. c. 76), the Titles to Land Act, 1868, provides a method for obtaining either a Crown writ of *clare constat* or a precept from Chancery by any person who has obtained himself served, specially or generally, as heir to a deceased ancestor who held lands of the Crown (ss. 84, 85). But it may be said that in practice neither of these writs is used by an heir in taking infeftment in lands held of the Crown, infeftment in such a case

being invariably taken by an heir's recording an extract decree of special service in his favour, when his ancestor died infeft, and by expeding and recording a notarial instrument, following on an extract decree of general service, when his ancester died with only a personal title to the lands. If, however, an heir would desire either a Crown writ of *clare constat* or a precept from Chancery, he requires to lodge with the Sheriff of Chancery (see sec. 57 of 37 & 38 Vict. c. 94, altering secs. 84, 85 of 31 & 32 Vict. c. 101) his extract decree of special service, or of general service, a draft of the proposed writ or precept prepared by his agent, being a Writer to the Signet, in the form, or as nearly as may be in the forms as the case may require, of Schedule (U), No. 1 (containing form of writ), and No. 2 (containing form of precept), annexed to the Act of 1868, a note in the form of Schedule (S) of the Act of 1868, praying for a writ or precept, and the last Crown writ and all the title-deeds of the lands subsequent thereto, together with evidence of the valued rents where necessary, and an inventory and brief of the titles (see secs. 64, 84, and 85 of 31 & 32 Vict. c. 101, and sec. 57 of 37 & 38 Vict. c. 94). The draft of the writ or precept falls, since the commencement of the Conveyancing Act, 1874, to be revised by the Sheriff of Chancery—formerly it was revised by the Presenter of Signatures—on behalf of the Crown: and as soon as it is docqueted as revised and approved of by the Sheriff of Chancery, or in case of objections to the draft, as revised, being stated, as soon as the same shall have been disposed of by the Lord Ordinary in Exchequer causes, the draft is transmitted to the office of the Director of Chancery. The draft, as transmitted, forms a valid and sufficient warrant for the preparation in Chancery of a writ of *clare constat* or precept, in terms of the draft as finally adjusted, and the writ or precept is engrossed in the office of the Director of Chancery in terms of the draft, and signed by the Director of Chancery or his depute or substitute, and recorded at length in the Register of Crown Writs, and delivered to the person applying for the same, or his agent, on payment of any fees and charges due. The writ of *clare constat* or precept from Chancery, when so engrossed and delivered, and, with warrant of registration thereon, recorded in the appropriate register of sasines, has the same legal force and effect in all respects as if a precept from Chancery had been granted, and an instrument of sasine thereon had been duly expede and recorded in favour of the person or persons on whose behalf such writ of *clare constat* is presented for registration, at the date of recording the said writ or precept. When a writ of *clare constat* or precept is granted on behalf of the Prince and Steward of Scotland, the deed is also in the form of Schedule (U), but runs in name of the Prince and Steward of Scotland, without adding His Highness's other titles, and the lands, instead of being described as held of Her Majesty and her royal successors, are described as holding of the Prince and Steward of Scotland (see general note to Schedule (U)). The Titles to Land Act, 1868 (s. 78), made it unnecessary to have the seal, appointed by the Treaty of Union to be kept and used in Scotland in place of the great seal thereof formerly in use, affixed to any writs from Her Majesty, or the seal of the Prince, if the writ be of lands holden of the Prince and a separate seal be then in use for such writs, affixed to any writ from the Prince, unless the receivers of such writs require the appropriate seal to be affixed.

The Act 1693, c. 35, provided that procuratories of resignation and precepts of sasine should continue to be sufficient warrants for infeftment notwithstanding the death of the granter or grantee, but the provisions of the Act did not apply to precepts of *clare constat*; and prior to the Lands

Transference Act, 1847 (10 & 11 Vict. c. 48), a precept of *clare constat* became ineffectual if infeftment under it had not been taken prior to the death of either the granter or the grantee. But the Act of 1847 (s. 15) enacted that all precepts of *clare constat* by subject-superiors should, notwithstanding the death of the granter thereof, remain in full force and effect during the whole lifetime of the grantee, and should continue effectual as a warrant for giving infeftment to the grantee in terms thereof at any time during the grantee's life. Re-enacting the provisions of 10 & 11 Vict. c. 48, s. 15; 21 & 22 Vict. c. 76, ss. 1 and 36; and 23 & 24 Vict. c. 143, s. 7 (it may be noted that the last of these three Acts made it for the first time competent for an heir in lands held burgage to complete a a title by writ of *clare constat*), the Titles to Land Consolidation Act of 1868 enacts that all writs and precepts of *clare constat*, whether from subject-superiors or from magistrates of a burgh, already made and granted, and still subsisting and in force, and all such writs and precepts of *clare constat* to be made and granted thereafter, shall, notwithstanding the death of the granter thereof, remain in full force and effect during the lifetime of the grantee, and shall continue effectual as a warrant for giving infeftment to the grantee personally by sasine, in terms thereof, or by recording the same, with warrant of registration thereon in his favour, at any time during the grantee's life (s. 103). But it must be kept in view that, although all writs and precepts of *clare constat* by subject-superiors or by magistrates of a burgh are valid warrants of infeftment in favour of the grantee during his life, yet all Crown writs of *clare constat* or precepts issued from the office of Chancery are null and void unless recorded with a warrant of registration thereon, on behalf of the heirs in whose favour they are granted, in the appropriate register of sasines before the first term of Whitsunday or Martinmas posterior to the date of such writ or precept, without prejudice to a new writ or precept of *clare constat* being issued (31 & 32 Vict. c. 101, s. 86),—the object of this provision being, that the Crown might not be deprived of non-entry duties by an heir's delay in taking infeftment.

A precept or writ of *clare constat* can be granted only to the immediate heir of the investiture, and is not a competent mode of completing the title of one who is not, at the time of granting it, the immediate heir of a person who has died infeft in lands, even although the immediate heir has consented to it. Thus where a precept of *clare constat* was granted to the immediate heir in liferent and his son in fee, an infeftment taken in these terms was held inept as regards the son (*Landales*, 1752, Mor. 14465, 2 Ross's L. C. 253; *Finlay*, 1770, Mor. 14480). A disponee cannot make up a title by precept or writ of *clare constat* (Bell, *Prin.* s. 1818). At common law, a precept of *clare constat* was not invalid although it did not set forth the precise character in which the heir claimed an entry (*Chrichton's Trs.*, 1798, Mor. 15115, 2 Ross's L. C. 280; *Durham's Trs.*, 1798, Mor. 15118, 2 Ross's L. C. 287; *Fairservice*, 1789, Mor. 14486, 2 Ross's L. C. 286); and the reason given for this was that a precept of *clare constat*, not being an *actus legitimus*, and being applicable to a particular subject and investiture only, was not to be tried by the same punctilious rules as a service (per Lord Balgray in *Ogilvy*, 1817, Hume, 724). The Conveyancing Act, 1874, however, now provides that, notwithstanding any existing law or practice, it shall be no objection to any precept or writ from Chancery or of *clare constat*, or to any decree of service, whether general or special, or to any writ of acknowledgment, whether obtained before or after the commencement of the Act, or to any other decree, or to any petition, that the character in which an heir is or may have been entitled to succeed is

erroneously stated therein; provided such heir was in truth entitled to succeed as heir to the lands specified in the precept, writ, decree, or petition (s. 11). An entry by precept of *clare constat* did not imply passive representation beyond the value of the subject (*Farmer*, 1683, Mor. 14003). Where an investiture is renewed by precept or writ of *clare constat*, the precept or writ does not import a new investiture, and accordingly it was held, in the case of *Stewart* (3 June 1813, F. C.), that limitations in a feu-right regarding the casualties of superiority were not altered by a renewal of the investiture by a precept of *clare constat*, in which they were not repeated, on the ground that a precept of *clare constat* is merely the acknowledgment of a person as heir of his predecessor under the conditions and obligations contained in the investiture, and that any alteration thereon can only be made by express agreement (see also *Magistrates of Edinburgh*, 1777, 5 Bro. Supp. 612). If an infeftment is taken on a writ or precept of *clare constat* granted by a superior not infeft, the vassal's infeftment will become effectual by accretion on the superior's infeftment (*Dickson*, 1801, M. App. Tailzie, 7). Since the commencement of the Conveyancing Act, 1874, a writ or precept of *clare constat* is, it is thought, an *ex facie* valid irredeemable title to land in the sense of sec. 34 of that Act, and, on being recorded in the appropriate register of sasines, is a sufficient foundation for the positive prescription of twenty years, for this reason that, as the law stood before 1874, a prescriptive progress of titles, starting from the infeftment of an heir to whom a precept of *clare constat* had been granted, did not require to contain the warrant of the heir's infeftment (1617, c. 12; and *Earl of Argyle*, 1671, Mor. 10791). A decree of service was secured from challenge, so far as it represented a verdict of propinquity in favour of an heir, by the running of twenty years after its date; but this viennial prescription, introduced by the Act 1617, c. 13, as to retours, did not apply to precepts and writs of *clare constat* (*Neilson*, 1837, 15 S. 365; 1840, 1 Rob. App. 82; Ersk. iii. 8. 71; and see sec. 13 of 37 & 38 Vict. c. 94).

[See Stair, ii. 3. 14; iii. 5. 26; Ersk. iii. 3. 42; iii. 8. 71; Duff, 483; Menzies, 805; Bell, *Lect.* 735, 1096, 1117; Bell, *Prin.* ss. 777, 817, 845, 1818, 1840, 1922; *Jur. Styles*, vol. i. 385.]

Clay.—Clay passes to a purchaser of lands as *pars soli*; and it is included in a general reservation of mines and minerals. A compulsory purchase of lands under the powers of the Railway Clauses Consolidation and Waterworks Clauses Acts does not carry the clay therein, unless expressly purchased, "except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works." This, however, does not apply to a seam of clay forming the subsoil of the lands conveyed (*Mags. of Glasgow*, 1888, 15 R. (H. L.) 94). The words "necessary to be dug or carried away or used in the construction of the works" may entitle a company to use clay necessarily dug out of a cutting on the land of one person to construct an embankment on the land of another; but they do not entitle a company who carry a railway over the land of one person, to excavate merchantable clay therefrom, and use it to puddle bridges which they are building on other land (*Loosemore*, 1882, 22 Ch. D. 25, per Fry, J.; but see *Jamieson*, 1868, 6 S. L. R. 188).

Rent in a lease of clay is sometimes a fixed sum per superficial area, sometimes a royalty per cubic yard of clay removed, sometimes a specified royalty for tiles or bricks manufactured or sold. Pipeclay was held

excluded from a lease of lands without express power to win it (*Colquhoun*, 1668, M. 15, 253). The Coal Mines Regulation Act applies to mines of fireclay, and to clay not generally known as fireclay, when worked by mine in the coal measures. The Metalliferous Mines Act applies to clay wrought in other mines. (For construction of special stipulations as to working of clay, see *Gordon*, 1837, 15 S. 549; *Newton*, 1880, 43 L. T. (N. S.), 197.)

See LEASE: RESERVATIONS; MINES: MODE OF WORKING; SUPPORT; RAILWAY CLAUSES CONSOLIDATION; WATERWORKS CLAUSES.

Clergyman.—See MINISTER.

Clerical Error.—(1) *In Judicial Proceedings.*—A clerical error is a trivial error, not *in essentialibus*: if made in a judicial document, it may be amended by order of the Court.

In Summons.—Even prior to the Court of Session Act of 1868, which allows any amendment upon conditions, the Court permitted the amendment of all errors of a clerical or trivial nature (*Scott*, 1855, 17 D. 932).

In Interlocutors and Judgments.—By A. S. 11 July 1828, sec. 63, a Lord Ordinary may, with consent, correct any error prior to extract. The Inner House may correct clerical errors after the interlocutor has been signed.

In Extracts.—Clerical errors in extracts may be corrected by petition to the Inner House (*Cadell*, 1853, 15 D. 282; *Scott*, 1855, 17 D. 932; *Hope*, 1851, 13 D. 1268; *Small's Trs.*, 1856, 18 D. 1210; *Smith & Turnbull*, 1891, 29 S. L. R. 137), or by motion to the Lord Ordinary (*Miller*, 1852, 12 D. 965).

Criminal Law.—Under the Criminal Procedure (Scotland) Act, 1887, it is provided that no objection by a person accused to the validity of the citation against him on the ground of error in the copy of the indictment served on him or in the notice of citation shall be competent unless stated to the Sheriff at the first diet; and no such error shall entitle the accused to object to plead to such indictment unless the Sheriff is satisfied that the same tended substantially to mislead and prejudice such accused person (s. 33). See also *Riddell*, 3 Feb. 1881, 4 C. 397; *Gallie*, 21 Nov. 1883, 11 R. (J. C.) 13; *Dunsmore*, 1896, 4 S. L. T., No. 207; and Brown on *Summary Jurisdiction*, p. 205.

(2) *In Deeds.*—See DEEDS, EXECUTION OF.

Clerk of the Crown.—The Clerk of the Crown in Chancery is an officer of Parliament and of the Lord Chancellor, and is appointed by the Crown. He makes out and issues writs summoning peers, writs of attendance, commissions to summon and prorogue Parliament, commissions to pass Bills, and all other commissions in the House of Lords. He attends in that House, and reads out the titles of the Bills to which the Royal assent is to be signified. He receives and has custody of the returns of elections of Scottish peers, and certifies the same to the House. When a new Parliament is to be summoned, the Clerk of the Crown, on the warrant of the Lord Chancellor, issues writs to the returning officers of the various constituencies. The returns, which are made by a certificate under the hand of the returning officer, are transmitted to the Clerk of the Crown, who thereupon makes up and delivers to the Clerk of the

House of Commons a Return Book of the names of the members so returned. On the occurrence of a casual vacancy, whether during session or recess, the Clerk of the Crown issues a new writ upon the warrant of the Speaker of the House of Commons, and, on the return of the writ, sends a certificate thereof to the Clerk of the House. It is his duty to attend the table of the House to amend returns, and to give information when any irregularity arises with reference to returns. In England, but not in Scotland, the ballot papers after an election are transmitted to him for custody.

Nearly all patents passing the Great Seal are made out in his office, and, in particular, all patents of creation under the Great Seal are so made.

He is registrar of the Lord High Steward's Court of State Trials, and also registrar of the Coronation Court of Claims.

[*Second Report of Legal Departments Commission*, 1874, p. 39; May, *Parliamentary Practice*, 146, 165, 167, 601; Nicolson on *Elections*, 197, 239, 255; 35 & 36 Vict. c. 33; 37 & 38 Vict. c. 81.] See PARLIAMENTARY ELECTIONS; PARLIAMENT.

Clerk of Justiciary.—*History.*—In the early history of the Justiciary Court the present office of Clerk of Justiciary had its parallel in the office of Clerk to the High Justiciar or Justice General, who exercised a supreme jurisdiction in matters criminal as well as civil. In the Act of Parl. 1449, c. 28, his clerk is styled as Justice Clerk, and referred to as the officer having the charge of the rolls containing the names of the persons indicted at the Justice Ayres. His business further appears to have been (by himself and by his deputes) to take up dittays, *i.e.* to make inquisition of persons suspected of crimes, and thereon to frame indictments against these that were to be tried at the Justice Ayres or Circuit Courts; and also to make preparation for the trials on the Justice Ayre by issuing the necessary precepts for arresting the delinquents and having them served with their dittay, and summoning the witnesses against them (1424, caps. 10, 20, 33, 35, & 36; 1491, caps. 34, 35). By the Act of 1587, c. 82, a new scheme for taking up dittays was introduced, whereby those who discharged this duty did so by the authority of the king's commission; but without any new legislation it appears that the older method had been reverted to. The Justice-Clerk acted as Clerk to the Justiciar so far down as the reign of Charles I., about which time he was repeatedly called upon to act as assessor to the Court in cases of difficulty or importance. In his commission recorded 28th November 1623, Sir Archibald Napier of Merchieston, a Lord of Session and Clerk of the Court of the Justiciar, was styled as "Clarke of our Justiciarie Generall," and was empowered to appoint deputes. The act or warrant relative to an Order of the Privy Council of 24th November 1663 is expressed as if the Justice-Clerk had already been a known judge of the Justice Court, and he is referred to as Lord Justice-Clerk. In the sederunt of the Court of 1st December 1663, where this Act is produced and recorded, the name of the Justice-Clerk—"Dominum Joannem Home de Rentoun, Clericum Justitiarium"—is for the first time inserted as one of the judges of the Court; and in the sederunt of 10th December 1663, there is produced a second Act of Council, dated 8th of that month, which declares that the Lord Justice-Clerk "is ane of the judges of the Justice Court." Sir John Home was, when appointed Clerk of Justiciary, a judge in the Court of Session. Thereafter the officer who discharged the duties of Clerk of Justiciary was styled

Depute in the Clerkship of Justiciary or Justice-Clerkship, and received his commission from the Lord Justice-Clerk until as after mentioned. On 17th December 1666, there is recorded a commission by Sir John Home of Rentoun, who, as above mentioned, had been promoted from the Clerkship to the Bench, in favour of Thomas Gordon, writer in Edinburgh, as depute in the office of Clerkship to the Commissioners appointed for trying persons concerned in the Rebellion. On 4th June 1672, there was presented a commission, granted by Sir James Lockhart of Lee, "Principal" Justice-Clerk, in favour of Robert Martin, writer in Edinburgh, as depute clerk in the office of Clerkship of Justiciary. On 7th November 1681, Thomas Skene, second son of John Skene of Halyards, advocate, presented a commission from the Lord Justice-Clerk appointing him Clerk to the Justice Court, but this commission was not recorded. It appears that about this time the king had assumed the right of making this appointment, as on 6th November 1682, Thomas Skene resigned his office, having been informed that Thomas Gordon, W.S., eldest son of James Gordon of Buthlay, Aberdeenshire, had obtained a gift and commission from the king under the Great Seal; and on the same day Thomas Gordon was received by the Court as clerk to the Justice Court during all the days of his "lifetime." Twelve years afterwards—23rd April 1694—there is recorded a letter from the king, restoring to the Lord Justice-Clerk the power of naming and appointing all Clerks of Justiciary; and on the same day there is recorded a commission by the Lord Justice-Clerk to James Montgomery, younger of Lainshaw, to be Clerk-Depute in the office of Clerkship of Justiciary during all the days of his life. From this time until the passing of the Act 2 & 3 Vict. c. 36, the Lord Justice-Clerk continued to exercise the right to appoint the Clerk of Justiciary, who, in all the commissions during that period, was styled as Clerk-Depute in the office of Clerkship of Justiciary. During that period the office was filled as follows:—

1694. James Montgomery, younger of Lainshaw.
1726. John Davidson of Whitehouse, W.S., writer in Edinburgh.
1755. George Muir, W.S., of Cassencarrie, Kirkcudbrightshire.
1783. William Miller, advocate, created a baronet 1789, afterwards took his seat on the Bench as Lord Glenlee, 23rd May 1795.
1795. Robert Dundas M'Queen, advocate, eldest son of Lord Justice-Clerk Braxfield.
1816. John Boyle of Shewalton, jointly with Patrick Boyle, eldest son of the Lord Justice-Clerk. The latter was born 1806, and was therefore ten years of age when appointed.

In 1833 the said John Boyle having resigned office, a commission was recorded in favour of the said Patrick Boyle. In 1839 the Statute referred to—2 & 3 Vict. c. 36, s. 3—enacted that "after the present Lord Justice-Clerk and the present principal Clerk of Justiciary shall cease to hold their offices, the appointment to the offices of principal and depute clerks of the Court of Justiciary, and also of the circuit clerks of the said Court, shall, as vacancies occur, be vested in Her Majesty, her heirs and successors." On 30th April 1856, in respect of a payment made to him by the Treasury, Patrick Boyle renounced his office of principal Clerk of Justiciary. On 22nd May 1857 a royal warrant or commission under the sign manual in favour of Charles Neaves (father of the late Lord Neaves), as sole Clerk of Justiciary, was recorded. Under a like style and title, Alexander Forbes Irvine of Drum (appointed February 1867), Charles Scott, advocate, (appointed July 1874), and the present Clerk of Justiciary (appointed July 1892), have been admitted to the office. On appointment the

Clerk presents his commission to the Court. It is then recorded in the Books of Adjournal and the declaration *de fideli administratione officii* administered, after which the Clerk is admitted and received in Court as sole Clerk of Justiciary.

Duties.—The Clerk of Justiciary has an office at 2 Parliament Square, Edinburgh, and the staff there consists of the principal and two assistant Clerks. The hours of the Justiciary Office are 10 A.M. to 4 P.M. (on Saturdays from 10 A.M. to 1 P.M.). The office of Assistant Clerk of Justiciary is filled by the nominee of the principal Clerk, subject to his passing an examination to the satisfaction of the Civil Service Commissioners in general knowledge and Scots law, especially the practice and procedure of the High Court of Justiciary. The principal Clerk of Justiciary is empowered by his commission to grant, with the sanction of the Lords Commissioners of Justiciary, deputations to one or more fit persons. These are in use to be granted in favour of one or both of his assistant clerks; and after such deputation has been presented to the Court and recorded in the Books of Adjournal, the grantee is admitted and received in Court as Depute Clerk of Justiciary. For the purposes of the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35, s. 1), "Clerk of Justiciary" is declared to include Assistant Clerk of Justiciary, and to extend and apply to any person duly authorised to execute the duties of principal Clerk of Justiciary or Assistant Clerk of Justiciary.

The Clerk of Justiciary attends the sittings of the High Court of Justiciary at Edinburgh. The duties of Clerk to the High Court of Justiciary, when sitting elsewhere than in Edinburgh, were formerly discharged by three specially appointed clerks called the Circuit Clerks; but it was provided by the Criminal Procedure (Scotland) Act, 1887, s. 73, as amended by the Clerks of Session (Scotland) Regulation Act, 1889, s. 10, that on these offices becoming vacant, they should not be filled up, but that the duties of Clerk to the High Court of Justiciary, when sitting elsewhere than in Edinburgh, should be performed by the first Assistant Clerk of Justiciary and the Depute Clerks of Session, in a rotation to be appointed as provided by the said Acts.

When a sitting of the High Court of Justiciary at Edinburgh for the trial of criminal causes is desired, application, in the form of a letter by Her Majesty's Advocate, is made to the Court. This letter is handed by the Crown Agent to the Clerk of Justiciary, who lays it before a judge, who, in token of his approval, adhibits his signature to the document. Thereupon the Clerk of Justiciary addresses a precept to the Sheriff of the Lothians and Peebles, requiring him to return to the Justiciary office a list of persons qualified and liable to serve as jurors in terms of the Acts of Parliament, to pass upon the assize of all parties cited to the said sitting. Simultaneously, or nearly so, the Clerk of Justiciary issues a warrant for the citation of persons accused, under which the Crown is enabled to proceed with the service of indictments. This warrant, or certified copy thereof, under the hand of the Clerk of Justiciary, is also the authority for the citation of jurors and witnesses for the prosecution and persons accused, and these warrants or certified copies are furnished by the Clerk of Justiciary to the Crown Agent, or to agents for accused parties, on demand. When the Sheriff Clerk furnishes the list of assize, the Clerk of Justiciary supervises the printing of it, gets one of the Lords Commissioners of Justiciary to sign the principal list, and lodges the same in the office of the Sheriff Clerk, Edinburgh, not later than the day of service, as required by sec. 38 of the Procedure Act. After the pleas

have been taken at the first diet, the Sheriff Clerk transmits to the Clerk of Justiciary the record copies of the indictments containing Sheriff's endorsements and all productions, and these remain in the custody of the Clerk. Thereupon the Clerk of Justiciary considers what number of jurymen would be appropriate for the trial of the cases remaining for trial, and directs the Sheriff Clerk to cite the jurors accordingly. The Sheriff Clerk returns to the Clerk of Justiciary a certificate of citation, and forwards to him any letters from jurymen on the list claiming exemption or asking relief from attendance. The Clerk of Justiciary, in his own discretion, or after consulting the Court, deals with those letters.

When an accused person in prison is not able to furnish himself with, or is not represented by, agent or counsel, the Clerk of Justiciary, from a rota of the agents and counsel for the poor, intimates to those next in turn that it is their duty to act.

At the second diet or trial diet the Clerk calls over the jury, marks absentees, reports to the Court, and takes directions as to fining them. The trials then proceed in their order, the Clerk calling the diet, balloting the jury, reading the charge to them, swearing them, and minuting the proceedings in the Minute Book of Court. He receives and records the verdict, and signs all, other than capital, sentences (which are signed by the presiding judge), and furnishes extracts of sentences to the prison officials as their warrant for removing and detaining the prisoners. Any articles of property produced at the trial are delivered up by the Clerk to the owners thereof in Court at the conclusion of the trial, where the ownership is clear and no objection stated to the Clerk, or they may be given up by the Clerk to the Procurator-Fiscal in charge of the case.

If the prosecution is at the instance of a private party, with consent of the Lord Advocate, the prosecutor presents to the Court a bill for criminal letters. If the prayer of the bill is granted, the criminal letters following them are prepared by the Clerk of Justiciary.

The Clerk of Justiciary keeps in his office at Edinburgh all Minute Books and records of the High Court, whether sitting at Edinburgh or elsewhere, and prepares and keeps the Books of Adjournal for all sittings of the High Court of Justiciary.

All appeals taken to the High Court of Justiciary at Edinburgh, bills of suspension, of criminal or quasi-criminal convictions or sentences, bills of advocation, or documents forming the initial steps in other processes of review competent before the High Court of Justiciary, are lodged with the Clerk of Justiciary, who forthwith lays them before a judge. In appeals under the Summary Prosecutions Appeals Act, 1875, the Clerk of Justiciary requires the Clerk of the inferior Court to transmit the process to him. The agent or party discharges this duty in all other processes of review before the High Court, the initial deliverance in bills of suspension specially granting warrant for and ordaining transmission of the proceedings in accordance with the usual form of the prayer. So soon as a diet for hearing appeals is fixed by the Court, the Clerk of Justiciary puts out in the rolls the cases for hearing, and intimates to the agents or parties in each case. He attends the sitting of the Justiciary Appeal Court, and writes the interlocutors of the Court; and extracts the decreets of the Court, which may be ordered at any time after judgment. All fees payable in processes of review before the High Court of Justiciary are payable in Law Courts stamps to the Clerk of Justiciary, and a return of these fees is made by him to the Exchequer. Formerly the Clerk of Justiciary acted as auditor of all accounts of expenses found due in the

High Court of Justiciary, where the expenses were not modified by the Court; but by the Courts of Law Fees (Scotland) Act, 1895, the duty of auditing those accounts has been transferred to the Auditor of the Court of Session. The accounts themselves are, in the first place, lodged with the Clerk of Justiciary, and, after taxation by the Auditor of the Court of Session, are returned to the Clerk of Justiciary as final custodier.

At the stated periods provided by Acts of Parliament and Order in Council for fixing the sittings of the Circuit Court, the Clerk of Justiciary receives from the judges the dates at which these circuits are to be held, and frames the appropriate Act of Adjournal, which is passed by at least three judges, and signed by the senior judge present. As therein directed, the Clerk issues to the Sheriffs of each circuit district precepts ordaining publication to be made by them that Circuit Courts are to be held at the times and places specified, and requisitions the Sheriffs of the sheriffdoms in which the circuit towns are respectively situated to return a list of assize to serve at the respective circuits, which, having been printed, and signed by a judge, is lodged by the Clerk of Justiciary with the Sheriff Clerk of the town wherein the Circuit Court is to be held. All warrants for citation of persons accused, jurors, and witnesses for prosecution and panel are, as in cases for trial in Edinburgh, issued by the Clerk of Justiciary, and are furnished by him to the Crown Agent or agent for accused parties on demand. Should there be no cases for trial at any of the towns where sittings have been appointed to be held, the Clerk of Justiciary sends notices to all the Sheriff Clerks of such circuit district that no sitting is to be held, and requires each to publish notice of this. When cases are set down for trial, the Clerk of Justiciary receives the indictments, with minutes of procedure, immediately after the first diet, and, as in cases for trial in Edinburgh, shortens, if he consider that advisable, the list of jurors to be summoned, and forthwith directs the Sheriff Clerk of the circuit district to cite the jury. After each circuit, the records of Court, indictments, documents, and all productions not returned to the owners thereof, or retained by the Procurator-Fiscal, are transmitted to the Clerk of Justiciary, who prepares from the Minute Books the Circuit Books of Adjournal, and these, with the Minute Books, indictments, and other papers or productions, are preserved in the Justiciary Office.

The Clerk of Justiciary has in his custody all the records of the Court, and the important documents in all cases brought before the High Court of Justiciary and Circuit Courts for several centuries.

The Clerk of Justiciary supervises the annual return by Sheriffs and chief magistrates of royal burghs of the progressive state of the registers, and lodges these returns with the Lord Clerk Register (Hume, vol. ii.; Lothian's *Forms of Process*). See JUSTICIARY (HIGH COURT OF).

Clerk of the Peace—The Clerk to the justices of the peace for the county.—By the Act 1685, c. 15, the justices themselves were empowered to nominate their Clerk, but (by 50 & 51 Vict. c. 52, s. 2) the appointment now lies with the Secretary for Scotland, coming in room of the Secretary of State (Acts 1686, c. 20, and 1690, c. 28). He may be suspended or removed only by the Court of Session (Barclay, *Justice's Digest*, *h.t.*). Bankton was of opinion (iv. 4. 9), following Craig (*Dig.* iii. 7. 20), that the clerks of all inferior Courts ought to be notaries (Hutcheson, *Justice of the Peace*, i. 51), but this has been disregarded in practice, and no special qualification is necessary for a clerk of the peace (Boyd, *Justice*, 84).

He, like the depute clerks mentioned below, is, however, usually a qualified lawyer. For convenience' sake, large counties are generally divided into districts by the justices, a depute clerk being appointed for each district by the principal clerk of the peace. He is responsible for his deputes, and may recall the deputation at pleasure. All the clerks must take the usual oaths for the faithful performance of their duties (Barclay, *Justice's Digest* (Chisholm)). Where the ordinary clerk fails to attend any particular Court, the justices present may appoint a clerk for that Court. By the Act of Sederunt, 6th March 1783, clerks and depute clerks are prohibited from practising as agents in the Courts of which they are clerks. Clerks so acting may, on complaint to the Court of Session, be fined and suspended (*Sellar*, 11 Feb. 1809, F. C.), or found liable in the expenses of the complaint (*Campbell*, 1830, 4 W. & S. 123): and in *Smith* (1827, 5 S. (N. E.) 788), where the clerk had acted as agent for the prosecuting party, a conviction by the justices was set aside, although the accused's agent had consented in writing to his so acting.

The powers and duties of the clerks of the peace, and their deputies, in regard to the justices and their Courts, are analogous to those of the sheriff clerk in the Sheriff Court. They have to attend the justices in their civil and criminal Courts, both in petty and quarter sessions; they issue small debt summonses, and have the care of all processes, such as they are; they act as clerks when the justices sit for licensing purposes, whether in sessions, or as a county licensing committee, or as a joint committee (39 & 40 Vict. c. 26, s. 7 (7)); they keep the books of record, and make the necessary entries therein; and, although not formally appointed assessors to the justices when acting judicially, they practically perform the duties of that office. By the Act of 7 Will. IV. and 1 Vict. c. 83, clerks of the peace in England, and sheriff clerks in Scotland, must take the custody of such documents (*e.g.* maps, plans, sections, etc.) as shall be directed to be deposited with them under the Standing Orders of either House of Parliament. The fees of the clerks are regulated by Statute (see 5 Geo. IV. c. 96; 6 Geo. IV. c. 48; 9 Geo. IV. c. 58; 25 & 26 Vict. c. 35; 31 & 32 Vict. c. 82; 39 & 40 Vict. c. 26; 39 & 40 Vict. c. 36).

By the Local Government (Scotland) Act, 1889, s. 11, subs. 5 (52 & 53 Vict. c. 50), the administrative powers and duties of the justices in regard to gas meters, weights and measures, the appointment of asylum visitors, the registration of the rules of scientific societies, etc., are transferred to the county council. By sec. 84 the Act further provides that the clerk of the peace in office at the passing of the Act shall, so long as he holds office, but without additional remuneration, act as clerk of the county council and under the direction of the council, as regards the business transferred. After he ceases to hold office, his duties in regard to the transferred business devolve on the county clerk.

[Forbes, *Justice of Peace*, i. 12. 17; ii. 9; Hutcheson, *Justice* (2nd ed.), i. 51; Blair, *Justice*, 47; Tait, *Justice*, *h.t.*; Macdonald, *Justice*, 38; Barclay, *Justice's Digest* (Chisholm).]

Clerk of Session.—The clerks of the Court of Session are called Clerks of Session.

1. *Principal Clerks.*—A. *Number and Nomination.*—The number of principal clerks has varied from time to time. By A. S. 3rd July 1621, the "Lords ordained that they would admit no mae Clerks of Session but thrie." Thereafter it would appear that their number was increased, for by A. S. 20th June 1676, the nomination of the clerks was conferred upon the Court,

and it was enacted that in future the number should be limited to three. By A. S. 8th June 1680, the nomination was retransferred to the Lord Clerk Register, and by the Act 1685, c. 38, other three clerks were added, there being thus six principal clerks, two being allocated to each of the three offices of Clerks of Session. This number was retained until the union of the Jury Court and the Court of Session. By the Act uniting these Courts it was ordained that the two vacancies next occurring in the office of principal clerk should not be filled (11 Geo. IV. and 1 Will. IV. c. 69, s. 13). By 1 & 2 Vict. c. 118, s. 5, the number of principal clerks was limited to four; their number is now reduced to two—one in the First and the other in the Second Division (52 & 53 Vict. c. 54, s. 1). Formerly they required to be advocates or writers to the Signet of three years' standing (Articles of Regulation, 29th April 1696), but now any duly certificated and enrolled law agent is eligible (52 & 53 Vict. c. 54, s. 12). The custom is to appoint an advocate in the First and an agent in the Second Division. Their appointment precludes them from acting as advocates or agents before the Court of Session. They are appointed by the Crown: they have fixed salaries of £1000 per annum, but are allowed no fees, except for services in election petitions, or for special duties imposed by Act of Parliament, or fees specially sanctioned by the Lord Advocate, with the approval of Her Majesty's Treasury (52 & 53 Vict. c. 54, s. 5). Formerly it was necessary, on their admission, to go through a form of trial (A. S. 2nd June 1697, and Shand, *Practice*, 104, note), but that custom has fallen into desuetude, and it is now only necessary for them to write an interlocutor in a cause appointed by the Court.

B. *Duties.*—The duties of the principal clerks are to write the entries in the Sederunt Books, to attend the sittings of the Court, to take charge of the processes before their respective Divisions, to adjust interrogatories when such are required, to write the interlocutors of the Inner House, to act as Clerks of the Bills in the Inner House, and as clerks in jury trials and proofs at which judges of the Inner House preside. They receive bonds of caution ordered in the Inner House, and satisfy themselves as to the sufficiency of the caution, and they act as deputies of the Lord Clerk Register at the election of the Representative Peers for Scotland. They are also vested with a general supervision over the whole staff of clerks in the Inner and Outer Houses and the Bill Chamber: and have power, with the approval of the Lord President, to make arrangements for the allocation of the duties of the other clerks, to provide assistance if necessary, to arrange the holidays, and to suspend any clerk for a period not exceeding six months, in the event of wilful neglect of duty. They are also required to prepare, or procure the preparation of, returns required by Parliament (52 & 53 Vict. c. 54, s. 1). Further, the Keeper of the Minute Book and Record of Edictal Citations and his clerk are under the general supervision of the principal clerks (*ib.* s. 7).

2. *Depute Clerks.*—In addition to the principal clerks, there are five depute clerks, one attached to the bar of each Lord Ordinary (1 & 2 Vict. c. 118, s. 12). They each receive the salary of £550 per annum, under 31 & 32 Vict. c. 100, s. 105. They also are appointed by the Crown. To a great extent the duties of the depute clerks are of a similar description to the duties of the principal clerks. The depute clerks are to the judges who officiate in the Outer House what the principal clerks are to the judges who officiate in the Inner House. They attend in Court during the sittings of the Lords Ordinary, at debates, proofs, and jury trials, and write the orders and interlocutors pronounced by them: and the depute clerks also adjust interrogatories. They act as Clerks of Court in jury trials at

circuit. It is provided by 1 & 2 Vict. c. 118, s. 7, that during the necessary absence of the principal clerks, it shall be competent for the depute clerks to discharge their duties. Each depute clerk has an office or apartment in the Register House, in which are kept the processes to which he is clerk. The depute clerks take a general superintendence of their offices, but the duty of attending there, which is regulated by the Act of Sederunt of 14th October 1868, sec. 17, is devolved almost exclusively, both in session and vacation, upon their assistants. By the Criminal Procedure (Scotland) Act, 1887, the duties of a depute clerk were extended. By that Statute it was enacted that when the existing Circuit Clerks of Justiciary died or resigned, their places should not be filled up, and their duties should be performed by the first assistant Clerk of Justiciary and the depute Clerks of Session, acting in such rotation as the principal Clerk of Justiciary, acting with the principal Clerk of Court, may determine (50 & 51 Vict. c. 35, s. 73, and 52 & 53 Vict. c. 54, s. 10).

3. *Assistant Clerks.*—A. *In the Inner House.*—Each principal clerk has an assistant, called the Inner House Depute, who assists the principal clerks in the exercise of their duty. They look after the processes, keep a Cheque Book of Court fees, and a Minute Book of Acts, interlocutors, and decrees, prepare Inner House bonds of caution, and certify copies of interlocutors, and proceedings for the House of Lords, sign warrants, and take charge of Bill Chamber proceedings in the Inner House. They further attend at the Register House during the hours prescribed by the Act of Sederunt of 14th October 1868, for the purpose of allowing inspection of the processes, of receiving papers and marking them, and of lending them out. They are appointed by the Crown. Upon the reduction of their number in 1889, their salaries were increased from £475 to £550; but they are allowed no fees, except such as are authorised by 52 & 53 Vict. c. 54, s. 5. There are, in addition, two ordinary clerks, who assist the Inner House depute clerks. The salary of the ordinary clerks is £250.

B. *In the Outer House.*—Each depute clerk has an assistant, who aids him in the discharge of his duty, and performs it for him in his absence. Besides being present in Court, they attend at the Register House for the same purpose as the Inner House assistant clerks. They take charge of the processes, and transmit them to the judges for consideration. They receive papers lodged in process, and authenticate, mark, and inventory them. They keep minutes of proceedings, and assist in writing the interlocutors of the Lords Ordinary. By the Act of Sederunt of 14th October 1868, it is provided that the Inner and Outer House assistant clerks shall attend at the Register House and keep their offices open for the performance of their official duties during the following hours, namely: In time of session, every sederunt day, except Saturday, from 2 till 5 afternoon, and on Monday from 11 forenoon till 3 afternoon: in time of vacation and recess, on Tuesday, Wednesday, and Thursday, from 11 forenoon till 1 afternoon, except during the week in which a box-day occurs, and the week immediately following, when attendance shall be given every lawful day, except Saturday in the last-mentioned week, from 11 forenoon till 1 afternoon. The salary of the assistant clerk in the Outer House is £475.

Clerk of Teinds.—This designation is assigned to the principal clerk of the Court of Teinds (see Teind Court) under the Act of 1838 (1 & 2 Vict. c. 118, s. 26), but the name in more general use is Teind Clerk. He is appointed by the Crown, and the present clerk has a salary of £500

allowed by the Treasury under sec. 105 of the Court of Session Act, 1868. The office of Depute Clerk and Extracter under the above Act (ss. 26 and 27) has not been filled up, and the duties are at present discharged by the Teind Clerk, with the aid of assistants, none of whom have a commission except a keeper of records. The allowances to assistants are paid by the Treasury, and the fees are accounted for and paid by means of fee stamps (Treasury Regulations, 25th March 1873, under Courts of Law Fees Act, 1868). The Teind Rolls and Minute Book are kept by the Teind Clerk.

The *duties* of the Teind Clerk, so far as the sittings of the Court are concerned, are to attend and write the interlocutors, once a week before the Lord Ordinary on Teinds, once a fortnight before the Court of Teinds, and, in addition, the sittings of the Inner House in either Division when a Teind cause is being heard on reclaiming note from the Lord Ordinary on Teinds.

The Teind Records from 1630 down to the present time, so far as extant, are kept in the Teind Office, New General Register House, under the custody of the Teind Clerk, with the exception of a portion of the old documents returned from London, which are in the Lord Clerk Register's department, Old Register House. For an account of the Clerks to the Commission of 1627, and later Commissions, see Elliot, *Teind Court Procedure*, 43, 44, and for account of records now extant, 199 *et seq.* of same treatise.

The Teind Clerk alone can sign the summons in actions before the Teind Court (*Matheson*, 1862, 24 D. 436). On petition to the Court, the Clerk was allowed to sign a printed summons in the cases of *Barony* (20th January 1864), and *St. Cuthberts* (27th February 1882).

The Court of Teinds remit to the Clerk, in cases of erection of parishes *quoad sacra* (Act 7 & 8 Vict. c. 44), to report on the title to the church, and also the manse if part of the endowment, and the sufficiency of the security for the endowments; and in cases of transportation *quoad sacra* of churches and manses, to report on the new title. In actions of proving the tenor in Teind causes, the Court has remitted to the Clerk to report on the adminicles, and on his report gave decree (*Duke of Athole*, 1880, 7 R. 1195; *Earl of Wemyss*, 1883, 10 R. 1084).

Schemes of locality (see LOCALITY) fall to be prepared by the Teind Clerk (*Port of Monteith*, 1829, 1 Jur. 375); and it was held that when remitting to the Clerk to prepare an interim locality, "the Clerk was put in a judicial position" (see observations of L. P. M'Neill in *M'Diarmid*, 1862, 34 Jur. 354). The Lord Ordinary remits to the Clerk to frame localities; to report on the form of feu-charter, and vouchers of expenditure for roads, drains, etc., in glebe cases; and in Teind causes generally, on any matters on which a remit may seem necessary.

It was decided by the Court, that where the Teind Clerk received a remit to ascertain the practice upon certain points, he was entitled to remuneration (*Logan*, 1858, 20 D. 794). A question as to whether certain teinds were or were not bishops' teinds should be inquired into in the ordinary way by proof, and not by remit to the Teind Clerk (*MacLeod*, 1862, 24 D. 774). Where information and documents were got from the Teind Clerk as a haver, the Court ordered the report of the Commission to be withdrawn, and remitted to the Teind Clerk to make the necessary investigations, and to report (*Fogo*, 1867, 6 M. 105); and where a warrant is sought on the Teind Clerk to transmit an extracted process to a Court of Session process, the warrant is granted to transmit, but the process must be seen only in the Clerk's hands (verbal instruction of L. P. Inglis).

In Teind causes it is necessary to appoint the expenses of extract to be

allowed "as certified by the Clerk," but is unnecessary in the Court of Session under 13 & 14 Vict. c. 36, s. 29.

Under the Court of Session Consignation (Scotland) Act, 1895, which gives the custody of deposit receipts to the Accountant of Court, it has been provided (s. 17) that the expression Clerk of Court shall include the Clerk of Teinds. The deposit receipts in the Teind Court relate exclusively to glebe money under sec. 17 of the Glebe Lands (Scotland) Act, 1866.

Clerks of Advocates.—See ADVOCATE, *ad fin.*

Clerks to the Signet.—See WRITERS TO THE SIGNET.

Close Time.—In order to afford protection against the extirpation or great reduction in the numbers of certain animals, *ferae naturae*, which are valuable for food or for sporting uses, the law prohibits in some cases capture; in some, interference with the breeding; and in others, exposure for sale of these animals, during certain seasons of the year. These seasons are generally called "close time." The subject will be considered under the heads of the different kinds of animals which enjoy the benefits of such protection in one form or another.

WINGED GAME (*Grouse, Blackgame, Pheasants, Partridges*).—From a very early period the law of Scotland has afforded a measure of protection to winged game, by forbidding its capture during certain periods of the year (1427, c. 108; 1555, c. 51; 1707, c. 13; 22 Geo. II. c. 34). The matter is now regulated by the Statute 13 Geo. III. c. 54, which provides (sec. 1):—

"That any person who shall wilfully take, kill, destroy, carry, sell, buy, or have in his or her possession or use, any moor fowl or ptarmigan between the 1st day of December and the 12th day of August in any year, or any heath fowl between the 10th day of December and the 20th day of August in any year, or any partridge between the 1st day of February and the 1st day of September in any year, shall, for every bird so taken, killed, destroyed, carried, sold, bought, found, or used, forfeit and pay the sum of five pounds sterling, and in case of not paying the sum decreed within the space of ten days after conviction by a single sentence, shall suffer imprisonment for two months for each five pounds sterling thereof." It was at one time held that the Court have no power to modify the statutory penalty (*Whatman*, 1 Irv. 483), but see 44 & 45 Vict. c. 33, s. 6 (*a*). There is an exemption in favour of the owners of birds confined in mews or breeding grounds. The Act does not apply in the case of game killed during the legal season and kept for use after the commencement of close time (*Simpson*, 3 Barn. & Ad. 34), nor in the case of birds killed abroad and exposed for sale during close time (*Guyer*, 23 Q. B. D. 100). Prosecutions under the Act may be at the instance of the Procurator-Fiscal or of an informer or complainer (s. 8). The case is tried before the Sheriff (40 & 41 Vict. c. 28, s. 10): the proceedings may be in absence (*Cassilis*, Shaw's *Just. Cases*, 146); and the charge may be established by the oath of one or more credible witnesses (sec. 8 of 13 Geo. III. c. 54). One half of the penalty goes to the prosecutor and the other half to the poor of the parish (s. 10). An appeal may be taken to the High Court of Justiciary (s. 11).

Under the Act 1 & 2 Will. IV. c. 32, s. 4, as applied to Scotland by 23 & 24 Vict. c. 90, s. 13, a dealer in game is liable to a penalty of one

pound for every head of game found in his possession after the expiry of ten days from the commencement of the close time for the species, and a like penalty is attached to the buying or selling of game by any person after the expiry of the ten days.

Hares.—Under the Act 55 Viet. c. 8, the sale of hares is prohibited during the months from March to July inclusive, under a penalty not exceeding twenty shillings. Hares imported from abroad are excepted.

Ground-Game on Moorlands.—In the case of moorlands and unenclosed lands (not being arable lands), the occupier entitled to kill ground-game under the Ground Game Act, 1880 (43 & 44 Viet. c. 47), can exercise the right (sec. 1, sub-sec. 3) only from the 11th day of December in one year until the 31st day of March in the next year, both inclusive, but this provision does not apply to detached portions of moorlands or unenclosed lands adjoining arable lands where such detached portions of moorlands or unenclosed lands are less than twenty-five acres in extent. It will be observed that this provision introduces a close time for hares and rabbits on moorlands, but only as against capture by a person whose only right to take them is that of occupier of the ground.

Wild Birds.—The protection of wild birds at certain seasons of the year is dealt with under the heading of Birds, Protection of Wild.

Salmon.—From a very early period provision was made by the Scottish legislature to prohibit the taking of salmon at certain seasons of the year. The matter is now regulated by the Salmon Fisheries (Scotland) Act, 1862 (25 & 26 Viet. c. 97), and the Salmon Fisheries (Scotland) Act, 1868 (31 & 32 Viet. c. 123). Protection is afforded to the fish by the provision both (1) of an annual and (2) of a weekly close time.

(1) The annual close time must continue in every district for 168 days (s. 7 of 1868 Act), but the dates differ in different fishing districts. These dates were originally fixed by the Commissioners acting under the Act of 1862, but the matter is now in the hands of the Secretary for Scotland, who may alter the dates in any district. Rod-fishing may be sanctioned by the Secretary for Scotland for a certain period within the annual close time (sec. 8 of 1862 Act). The river Tweed with its tributaries is separately regulated under special Acts of its own, and the same is the case with the Solway and its tributaries.

(2) The weekly close time which is applicable to every method of capturing salmon, except by rod or line, is fixed by the Act of 1862 (s. 7) from six o'clock on Saturday night to six o'clock on Monday morning, but under the Act of 1868 the Secretary for Scotland has power (s. 9) to alter the hours as he may think expedient, but so that the period shall always extend to thirty-six hours. For rod and line the weekly close time extends for twenty-four hours, from midnight on Saturday to midnight on Sunday. Regulations were made by the Commissioners under the Act of 1862 for the manner in which nets and cruives are to be opened during the weekly close time. If nets cannot be put out of fishing order by six o'clock on Saturday, this must be done at an earlier hour, so as to insure a free run to the fish after six o'clock (*Irving*, 3 White, 46).

The penalties for fishing during either the annual or weekly close time are a fine not exceeding £5, together with a sum not exceeding £2 for each fish taken, with forfeiture of the fish (ss. 15 and 33 of the 1868 Act).

Like penalties are imposed (s. 21) upon buying or selling or possessing salmon during close time. In this connection close time extends from the commencement of the latest to the termination of the earliest close time which may have been fixed for any district in Scotland. This means the close time for nets and cruives. During the period when waters are open

for rod only, the onus of showing that the fish were captured by rod is on the person exposing them for sale (*Chalmers*, 1 White, 1).

The obstruction of salmon in their passage to spawning-beds is prohibited by the same Statute (s. 19), and another provision (s. 24) imposes the duty under certain penalties upon proprietors and occupiers of fishings to see that the close time is duly observed.

Under the Act, 26 & 27 Vict. c. 10, as amended by 33 & 34 Vict. c. 33, the exportation of salmon during close time is prohibited, and during close time the burden of proving that any salmon so to be exported were not taken during close time lies on the exporter.

Oysters.—The close time for deep-sea oysters extends from 15th June to 4th August, and for all other oysters, from 14th May to 4th August (40 & 41 Vict. c. 42, s. 4). During these periods the sale of such oysters is prohibited under stringent penalties.

Lobsters.—The taking of lobsters between 1st June and 1st September is prohibited under a penalty of £5 for each offence (9 Geo. II. c. 33, s. 4).

[Irvine on *The Game Laws*; Oke on *The Game Laws*; Stewart on *The Law of Fishing*.]

Closing of Record.—See RECORD.

Clubs.—A club is a voluntary association of a number of persons meeting together for purposes mainly social, each contributing a certain sum either to a common fund for the benefit of the members, or to a particular individual for his own benefit (Wertheimer's *Law Relating to Clubs*, 4; *Hopkinson*, 1867, L. R. 5 Eq. 63; 37 L. J. Ch. 173). A club is not an association within the meaning of the Companies Act (*St. James' Club*, 1852, 2 De G. M. & G. 383).

Constitution.—Clubs are of two kinds—(1) *Members' Clubs*, where the members contribute to a common fund, and where each member has a share in the assets and property of the club; (2) *Proprietary Clubs*, where members' contributions are paid to a particular individual, who has control of the club, and to whom the club-house and property belong. All profits go to him, and he alone is responsible for all losses.

There is another species of so-called clubs to which the term has been improperly extended, and which is divided into two classes—(1) *Club Companies*, and (2) *Registered Working Men's Clubs*. The first is really a company, and though the rules of law applicable to clubs as associations of individuals will apply to its internal affairs, other matters outside of these, such as debts and liabilities, are to be decided by the law relating to companies. The second being an association registered under the Friendly Societies Acts, 1875–1893, is governed by the law laid down in these Statutes. The position in law of a club is peculiar. It is an institution *sui generis*. A club *quâ* club has no recognised position in law; though a distinct entity, it is not a corporation, but an unincorporated society (per Day, J., *Steele*, 1886, 3 T. L. R. 119). Further, neither as between the members themselves, nor as against third parties, is a club a partnership. Each club is constituted by its own set of rules, and these form the contract between the members. If the rules are accessible to the members, they must be presumed to be acquainted with them (*Raggett*, 1827, 2 C. & P. 556; *Alderson*, 1816, 1 Stark, 405), and must be bound by them (*Lyttleton*, 1876, 45 L. J. Ch., p. 223; see *Innes*, 1844, 1 C. & K. 264). In general,

a member may withdraw at any time, and, unless under the constitution acceptance of his resignation is required, a person ceases to be a member from the time his letter of resignation is received (*Finch*, 1896, L. R. 1 Ch. 409). In most clubs, besides the usual officials, there is a committee of management. Such a committee, being the special and not the general agents of a club, can only do such acts as they are either expressly or by reasonable implication authorised to do.

Property.—In *Proprietary Clubs* the members are mere licencees, having, in return for their subscriptions, the use of the club-house and property in the manner prescribed by the rules.

In *Members' Clubs*, so long as a person remains a member he has a joint interest in the property of the club, and this right cannot be defeated by a vote of the majority of the members to gift away anything which is common property. Such an alienation, in opposition to the wish of the minority, has been held to be illegal, so as to warrant the interference of a Court of law; but it is not *ultra vires* of the majority, or of the officials, to dispose of club property, provided such disposal be incidental to the club's proper administration (*Murray*, 1896, 4 S. L. T. 130, 33 S. L. R. 714).

Dissolution.—If the rules of a members' club contain no provision for its dissolution, it must be agreed to by all the members. On the authority of an American case, it would appear that the Court will not interfere so as to grant any decree for dissolution unless it can be shown that the affairs of the club are not being honestly administered (*Laford*, 81 N. Y. 507). On dissolution, the members at the time are entitled to an equal share of the assets (*Brown*, 1878, 9 Ch. D. 78), and any deficit should be apportioned among them.

How Clubs may sue and be sued.—A club cannot sue or be sued in its own name without any addition (*Renton Football Club*, 1891, 18 R. 670). Though the question has not been judicially settled in Scotland, L. M'Laren, in this case, indicated an opinion that in most cases it would be a sufficient instance, if to the name of the club were added the names of its office-bearers. The safer course, however, and one which has been held to be competent, is for the club to sue along with a representation of its members duly authorised by a meeting of the club (*Renton Football Club, supra cit.*), This course was also followed in the recent case of *Murray, supra cit.*

Similarly, in suing a club, it is not necessary to call every individual member, but is enough if the club and its officials be called. If, however, the club were small and the names of the members easily ascertainable, it would be well to make them all parties to the action (*Renton Football Club, supra cit.*; *Somerville*, 1862, 24 D. 1187).

Liability of Members to Third Parties.

(a) Proprietary Clubs.—The whole liability for contracts made or goods supplied on behalf of such a club rests upon the proprietor, such contracts being really made for his own purpose (see *Allan*, 1894, 10 S. L. Rev. 296).

(b) Members' Clubs.—The question of the liability of members is based on the law of principal and agent; for the law does not recognise a club of itself as a party to a contract, and the creditor must look to the person who gave the order, who will generally be an official or servant. In such cases the ordinary rules of agency apply: and therefore, if the agent act within the scope of his authority, the club will be responsible for his actings. How far an official or a committee man may bind the members of the club at large, depends on the constitution of the club, to be found in its own rules (*Flemyng*, 1836, 2 M. & W. per Ld. Abinger, C. B., at p. 179). In the

usual case an ordinary member's liability does not extend beyond payment of his subscription and the price of meals, etc., taken at the club (*Steele*, 1886, 3 T. L. R. 119 and 773). The mere fact of being a member will not make one personally liable for goods supplied to the club, unless it can be shown that the member has in some way pledged his personal credit (*Overton*, 1886, 3 T. L. R. 246). The committee are the persons primarily liable. Thus the members of the committee of a football club have been held personally liable for injuries to one of the public through the collapse of a stand for the accommodation of visitors (*Brown*, 1896, 12 T. L. R. 454). But while an agent exceeding his authority is made personally liable, it does not follow that because a person is member of a committee which has gone beyond its functions, he is thereby made responsible. Indeed, to make a committee man personally liable in any case, as, for instance, for the price of goods ordered by the committee, it must be shown that he took an active part in the management, or authorised, or acquiesced in, the orders given (*Steele, supra cit.*: *Todd*, 1841, 7 M. & W. 427; 8 M. & W. 505; *Stansfield*, 1889, 5 T. L. R. 656).

Committee men exceeding their authority may escape personal liability if the club subsequently homologate their action (*Minnitt*, 1876, 1 L. R. Ir. Ch. D. 143). A member cannot, by resigning, escape liability that has arisen during his membership (*Parr*, 1885, 1 T. L. R. 285 and 525); but he is not liable for contracts made after his resignation (per James, V. C., *in re London Marine Association*, 1869, L. R. 8 Eq. 195).

Expulsion of Members.

1. *Jurisdiction of Courts of Law.*—No action can lie at the instance of a member of a voluntary association to enforce his right to membership, unless he can show patrimonial loss or deprivation of some civil right (*Aitken*, 1885, 12 R. 1206, per L. P. Inglis, 1212: see also *M'Millan*, 1861, 23 D. 1314, per Ld. Deas, at 1346: *Forbes*, 1867, L. R. 1 Sc. Ap. 568, per Ld. Cranworth, 581: and 4 M. 143, per L. J. C. Inglis, 157, per Ld. Cowan, 163). As it was well put in an English case, "The foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion" (per Sir George Jessel, M. R., in *Rigby*, 1880, 14 Ch. D. 482). In a members' club the payment of a subscription which goes to form a common fund belonging to the members jointly may be a sufficient right of property to give the Courts jurisdiction, the test being that the members are entitled, on the club's dissolution, to an equal share in its assets.

In a proprietary club, on the other hand, where the members have no right of property, but merely a right to use the club premises on payment of a subscription, the Court will not interfere, although the expulsion may have been irregularly carried out, but the expelled member may have his remedy in damages (*Baird*, 1890, 59 L. J. Ch. 673; *Lyttleton*, 1876, 45 L. J. Ch. 223).

2. *How the Power of Expulsion is to be exercised.*—The power of expulsion must be exercised in accordance with the rules and in good faith. The member ought to have notice of the reason for proposing to expel him, and an opportunity of defending himself (*Wood*, 1874, L. R. 9 Ex. 190, p. 196; *Russell*, 1880, 14 Ch. D. 471). If there be no provision in the rules, the expulsion may be carried out by a vote of the members, provided due notice be given to the member proposed to be expelled (*Innes*, 1844, 1 C. & K., per Ld. Denman, C. J., 264). In most clubs the power of expulsion is, under the rules, vested in the committee. The Court does not act as a

Court of Appeal from such committees. A Court of law, provided there be sufficient grounds to warrant the exercise of its jurisdiction, will only interfere so as to reinstate an expelled member—

(1) Where anything has been done which, though within the rules of a club, is contrary to natural justice.

(2) Where the expulsion has not been carried out according to the rules of the club.

(3) Where, though within the rules, the proceedings were not *bonâ fide*, but fraudulent and malicious; an unreasonable decision being strong evidence of malice.

[*Baird*, 1890, 59 L. J. Ch. 673; 44 Ch. D. 661; *Dawkins*, 1881, 17 Ch. D. 615; 44 L. T. 557; *Labouchere*, 1879, 13 Ch. D. 346; 41 L. T. 638; *Hopkinson*, 1867, L. R. 5 Eq. 63; 37 L. J. Ch. 173.]

Licensing Laws.—The Licensing Acts do not apply to members' clubs, or, in other words, a "sale" of spirits as between the club and a member is not a "sale" within the meaning of the Licensing Acts, making it necessary for the club to have an Excise licence to retail spirits (*Graff*, 1882, 8 Q. B. D. 373). This exemption extends to club companies (*Newell*, 1888, 5 T. L. R. 93; 60 L. T. 544). But the club must be a *bonâ fide* and not a bogus one. In *Madin*, 1894, 21 R. J. C. 40, 1 Adam, 376, it was held that though originally the club might have been a *bonâ fide* one, such character was lost by the system of admission practised, in habitual disregard of the rules (see also *Evans*, 1888, 52 J. P. 134).—[See Wertheimer, *Law relating to Clubs.*]

Coal Mines Regulation Acts, 1887 to 1896 (50 & 51 Vict. c. 58; 57 & 58 Vict. c. 52; and 59 & 60 Vict. c. 43).—The objects of these Statutes, which consolidate and amend former legislation dealing with the regulation of coal mines, are to restrict the employment of young persons, particularly under ground; to safeguard the interests of the workmen with respect to payment of wages; and to provide more effective means for the safety of those employed in mines. They apply to mines of coal, stratified ironstone, shale, and fire-clay (s. 3); other mines being regulated by the Metalliferous Mines Regulation Acts, 1872 and 1875. Any question (except in legal proceedings) under which Acts a mine falls to be regulated is to be determined by the Secretary of State (s. 71).

Interpretation.—"Mine" includes every shaft in course of being sunk, and every level and inclined plane in course of being driven, and all shafts, levels, planes, works, tramways, and sidings above and below ground, in and adjacent to and belonging to the mine.

"Shaft" includes pit.

"Owner" includes a body corporate, and embraces a lessee or occupier, but not a mere receiver of rent or royalty, nor an owner subject to a lease, nor an owner of soil not interested in the minerals. A contractor for the working of a mine is liable as an owner.

"Agent" means the representative of the owner, and is superior to manager.

"Boy" means a male under 16.

"Girl" means a female under 16.

"Woman" means a female over 16. (1887, s. 75.)

PART I.

Employment of Boys, Girls, and Women.—(*a*) *Below Ground.*—No boy under 12, and no girl or woman of any age, may be employed below

ground (1887, s. 4). Employment of boys above 12 must not exceed 54 hours per week, or 10 hours per day, subject to the following regulations:—

(1) An interval of 8 hours must elapse between work on Friday and work on Saturday; in other cases an interval of 12 hours.

(2) Working hours to be reckoned from bank to bank.

(3) Week to be reckoned from midnight on Saturday till midnight of following Saturday (ss. 5, 6).

(*b*) *Above Ground.*—The employment of boys and girls (1) under 12 is forbidden; (2) under 13 must not exceed 6 days per week, or 6 hours per day if employed more than 3 days per week; otherwise must not exceed 10 hours per day.

No boy or girl above 13, and no woman, may be employed more than 54 hours per week, or 10 hours per day, nor between 9 p.m. and 5 a.m., nor on Sunday, nor after 2 p.m. on Saturday: and the rules for employment of boys below ground as to maximum weekly and daily periods, intervals, and reckoning of weeks, apply to women and children over 13. Such persons may not be employed continuously for over 5 hours without half an hour's interval for a meal; nor over 8 hours in any one day without intervals amounting to 1½ hours. Their employment to move railway waggons is forbidden (s. 7). Where females are employed, the public health local authority may enforce the provision of separate privy accommodation, under penalty of £20 (ss. 74, 76 (10)).

A register of all boys employed below ground, and of all boys and females employed above ground, must be kept, and be open to the inspector, or school board officer. Notice must be given by a workman of his intention to employ a boy below ground (s. 8).

Contravention of any of the foregoing provisions is an offence, and the owner, agent, and manager are each declared liable, unless proof is given that all reasonable means to comply were used (s. 9).

Where a misrepresentation as to age has been made by a parent or guardian, the latter is liable, and the manager, if in *bonâ fide* belief, exempt (s. 64).

Wages.—The payment of wages in licensed premises is forbidden; and the owner, agent, and manager are each liable for contravention, unless all reasonable means were used to comply (s. 11).

Where the amount of wages paid depends on the amount of mineral gotten, payment is to be made according to the actual weight of the mineral contracted to be gotten, and the mineral gotten is to be truly weighed at a place as near the pit mouth as is reasonably practicable; provided that the owners and workmen may agree what deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, or in respect of any hutches being improperly filled, such deductions being determined in such special manner as may be agreed on: in case of difference, by a person to be agreed on, and, failing agreement, by a person appointed by the Sheriff of the county (ss. 12, 76).

The deduction of "slack" under an agreement that it should not be paid for has been held illegal, in respect "slack" is part of the "mineral contracted to be gotten, and the payment is thus not made "according to the weight of the mineral gotten" (*Bourne*, 1889, 14 App. Ca. 228). Similarly, deductions in respect of small coal are illegal (*Brace*, 1891, 2 Q. B. 699). An agreement that, if a certain tub, selected at random, contains more than a certain weight of dirt, no payment should be made in respect thereof, is illegal; but the whole contract of employment is not thereby vitiated (*Kearney*, 1893, 1 Q. B. 700). On the other hand, an

agreement for a uniform deduction from the gross weight of each hutch is lawful (*Ronaldson*, 1894, 21 R. (J. C.) 55). Also an agreement to adopt the "standard weight system," by which no payment is to be made for excess weight over 10 cwt.—overfilling being one mode of "improper filling" as to which agreement is permitted (*Atkinson*, 1894, 21 R. (J. C.) 62). The provisions of this sec. do not preclude an owner from dismissing a workman who, contrary to express instructions, continues to send up an undue proportion of dust (*Chell*, 1896, Q. B. D. 4 S. L. T. 40).

Contravention of this section is an offence, the owner, etc., being liable, unless all reasonable means to comply were used (s. 12 (2)).

The Secretary of State may, in the case of a mine where not more than 30 persons are employed underground, sanction any other mode of payment, on the joint representation of owners and employed (s. 12 (3)).

The workmen may appoint a check-weigher at each weighing place, to ascertain the weight of the mineral, or determine the deductions. Every facility must be afforded him to fulfil his duties, otherwise the owner, etc., is guilty of an offence, unless all reasonable means to comply were used. Question, whether an agreement to adopt the "standard weight" system dispenses with the obligation to afford facilities? (*Atkinson, supra*).

A check-weigher may not interrupt the working of the mine, or interfere with the weighing, which may proceed in his absence, unless he has reasonable grounds for believing that it will not proceed; and he may give information to workmen regarding the weighing, etc.

He may be removed at the instance of the owner, etc., on application to the Sheriff, for interrupting the working, interfering with the weighing or the workmen, or doing anything beyond his authorised duty to the detriment of the owner, who must show *primâ facie* ground; the check-weigher being then called upon to show cause against his removal. The removal is by summary order, which includes power to award costs, and is without prejudice to the appointment of another check-weigher. From such an order there is no appeal to the Court of Justiciary (*Cummings*, 1893, 31 S. L. R. 55).

Where workmen are paid by measure or gauge of the material gotten, in pursuance of an order of exemption, the provisions regarding weighing equally apply.

If the owner's weighing agent impedes the check-weigher, or improperly interferes with the weighing machine, he is guilty of an offence (s. 13).

On the dismissal of all the workmen, the check-weigher appointed by them ceases to be such: and till the passing of the Check-Weighers Act, an owner might dismiss and re-engage his workmen, on the stipulation that they should not appoint a particular check-weigher [*Whitehead*, 1878, 4 Ex. Div. 13; *Merrytown Coal Co.*, 18 R. 203].

By the Act in question, the Coal Mines (Check-Weigher) Act, 1894 (57 & 58 Vict. c. 52), interference with the appointment of a check-weigher, or refusal to afford the workmen facilities for meeting, or any attempt to improperly influence workmen in the election of a check-weigher on the part of an owner, etc., is declared an offence against the present Act.

A check-weigher, appointed by the majority by ballot, may recover his wages from the workmen: and with their consent the owner may pay the check-weigher direct (1887, s. 14).

The Weights and Measures Act, 1878, is to apply to all weighing machines, etc., used in mines. Inspectors of weights and measures are directed to examine all such weights every six months, and oftener if they

see cause; also the measures and gauges. An inspector has, with respect to mines, all the powers he would have if authorised by a justice of the peace under sec. 48 of the Weights and Measures Act; he must not, however, obstruct the working of the mine (1887, s. 15).

Single Shafts.—In every mine there must be two shafts, communicating with every seam at work, not nearer to each other than 15 yards, and communicating by a passage 4 feet wide and 3 feet high, or, if made after commencement of the Act, 4 feet high. Each shaft must have proper apparatus for raising and lowering persons, ready for use; and failure to comply with this section is an offence. The working of a mine where these rules are disregarded may be interdicted on the application of the Lord Advocate. This is without prejudice to any other remedy (s. 16).

Saving of acts necessary to comply with the aforesaid provisions (s. 17). The necessity for two shafts is not to apply—

1. To a new mine, in the case of workings for making a communication between two shafts, or workings to search for or prove minerals.

2. To any proved mine exempted by the Secretary of State on the ground that the quantity of mineral proved is small, or that the workings in any seam have reached the boundary, and that the pillars ought to be worked away, although a shaft is cut off thereby. In all the above cases, not more than 20 persons in all may be employed below ground.

3. To any mine exempted by the Secretary of State, because a shaft is being sunk, or has by accident become unavailable.

The provision requiring shafts to be 15 yards apart does not apply to a mine provided with two shafts sunk before 1st January 1865, though less than 10 feet apart, or begun to be sunk before the commencement of the Act, though less than 15 yards apart, if more than 10 feet. Mines may be exempted by the Secretary of State on special grounds from the requirements as to the size of the communication between two shafts (s. 18).

Division of Mine into Parts.—Where two or more parts of a mine are worked separately, the owner, etc., may give notice to the inspector, and each part is then to be deemed a separate mine. If the Secretary of State objects, the matter is to be referred to arbitration (s. 19).

Certificated Managers.—Every mine must be under the control of a responsible manager, whose name and address must be intimated to the district inspector. He must hold a first-class certificate. If a mine is worked for more than 14 days without such manager, the owner and agent are each liable to a fine of £50, and £10 for each day during which the mine is so worked. Provided that (*a*) the owner is not liable if he used all reasonable means to comply; (*b*) if for reasonable cause there is no qualified manager, an uncertificated manager may be appointed until he can obtain a certificate; (*c*) where not more than 30 persons are employed under ground, the mine is exempt from these provisions, unless the inspector requires otherwise (s. 20).

Daily personal supervision must be exercised by the manager, or by a duly nominated under-manager, holding a first or second-class certificate. The latter has the same responsibility, but that of the manager is not thereby affected (s. 21).

A contractor for mineral, or person employed by such, may not be a manager or under-manager (s. 22).

There are two certificates of competency granted under the Act: (1) First class, for manager; (2) second class, for under-manager. To obtain either, five years' practical mining experience is required. For the purpose of granting certificates, examiners are appointed by a Board chosen

by the Secretary of State, and consisting of 3 mine owners, 3 mine workers, 3 persons practising as mining engineers, mine agents, or managers, or coal viewers, and 1 inspector (s. 23). Their proceedings are regulated by the rules contained in Schedule I. They appoint examiners to examine applicants for certificates, may make rules for such examinations, which must have regard to practical efficiency, and they report to the Secretary of State (s. 24).

The Secretary of State may make rules as to examination and fees, subject to Schedule II. (s. 25).

Certificates are to be granted by the Secretary of State to applicants who have passed and produce evidence of sobriety and experience, and a register of certificate-holders is to be kept (s. 26).

The Secretary of State may direct an inquiry to be held on the conduct of any certificate-holder, under the following conditions:—(1) It must be held in public, by a person nominated by the Secretary of State, with or without assessors. (2) The accused must be furnished with a statement of the case. (3) A person appointed by the Secretary of State must conduct the case. (4) The accused may be sworn and examined if he choose. (5) The Court must report to the Secretary of State. (6) The Court may cancel or suspend the accused's certificate. (7) He must deliver up his certificate if required, under a penalty of £100. (8) The Court has all the powers of a Court of summary jurisdiction, and also of an inspector. (9) They may summon witnesses, whose expenses are to be allowed, the Auditor of the Sheriff Court being the referee in case of dispute (s. 27). The Court may award expenses, which may be recovered in a Court of summary jurisdiction (s. 28).

Where a certificate is cancelled or suspended, a record thereof must be made in the register; and the Secretary of State may restore a certificate, and cause it again to be registered (s. 29). Where a certificate has been lost, a certified copy may be issued, and is to be equivalent to the original (s. 30). It is a crime and offence (1) to forge, counterfeit, or knowingly make any false statement in any certificate of competency, or certificate of service; (2) to knowingly utter or use any such certificate; (3) to make any false statement or declaration, or knowingly use or utter such, for the purpose of obtaining employment for oneself or another as a certificated manager, or the grant or renewal of a certificate; punishable with imprisonment for 2 years, with or without hard labour (s. 32).

Returns, Plan, Notices, and Abandonment.—Annual returns are to be made to the inspector of the district, on or before 21st January, in terms of Schedule III. The particulars required include the number of persons (specifying young persons) employed during the year, the quantity of mineral wrought, and various details with respect to ventilation, etc. The Secretary of State may publish the aggregate results, but not (without consent) so as to show the quantity of mineral wrought in any one mine. Failure to comply with these provisions, or knowingly making a false return, is an offence (s. 33).

An accurate plan must be kept, showing details of the workings up to 3 months previously; such plan to be open to the inspector, who may make a copy. Failure to keep such a plan, or withholding information which the inspector is entitled to require, is an offence; and the inspector may require such a plan to be made at the owner's expense. Failure to make such a plan when required is an offence (s. 34).

Notice of Accidents.—The owner, etc., must give notice to the inspector within 24 hours of any accident, where (1) loss of life or personal

injury to any workman occurs from any explosion; (2) loss of life or serious personal injury occurs to any workman from any accident whatever. The *locus* must be left untouched for 3 days, or until the inspector has seen it, unless that would increase the danger, or impede the working of the mine. Where personal injury has proved fatal, notice in writing must be sent to the inspector within 24 hours of the owner's knowledge. Failure to comply with these provisions is an offence (s. 35).

Notice of Opening or Abandonment.—Notice must be given to the inspector within 2 months of (1) the opening, discontinuance, or recommencement of a shaft or seam after 2 months' discontinuance; (2) any change in the name of the mine, or owner, manager, or agent, or principal officer of the company (where that applies). Failure to comply therewith is an offence (s. 36).

Where a mine is discontinued [whether before or after the passing of the Act (*Stott*, 1876, 34 L. T. (N. S.) 291)], the duty of fencing the shaft and side entrances is imposed on the owner, and every other person interested in the minerals of the mine (s. 37). A lessee whose lease has expired is not an "owner" (*Stott, supra*). Nor is a leaseholder who is bound to pay all he receives, and has no pecuniary interest in the mine, an "owner" or "person interested" (*Arkwright*, 1880, 49 L. J. M. C. 82). But owners in fee, who have granted a lease, and receive a royalty, with reserved powers for securing payment, are "persons interested" (*Evans*, 1877, 2 C. P. D. 547).

Subject to any contract to the contrary, the owner is liable for fencing as between himself and any other person interested in the minerals, and liable to repay money expended by such person; and liability otherwise than under this section is not affected.

Failure to comply herewith is an offence. Saving of acts necessary for compliance with this section. Occupiers of land and others are guilty of an offence if they obstruct such operations. Where any shaft is unfenced within 50 yards of a high road, or in unenclosed land, the public health authority may deal with the same as a nuisance (s. 37; Public Health (Scotland) Act, s. 16).

Where a mine or seam is abandoned, the owner must send to the Secretary of State within 3 months an accurate plan showing the details of the workings. Such plan may not be disclosed to anyone but an inspector, except with owner's consent, until 10 years have elapsed. A return similar to the annual return required by sec. 33, *supra*, applicable to the period since the last annual return, must be sent to the inspector. Failure to comply with these provisions is an offence punishable with a fine of £30. Complaints or proceedings under this section must be laid within 6 months (s. 38).

Inspection.—The Secretary of State may appoint inspectors of mines, and assign their duties and salaries (s. 39).

No inspector may practise or be a partner of one who practises as a land agent, mining engineer, manager, viewer, agent, valuer of mines, or is otherwise employed in or about any mine, or is a miners' agent or mine owner (whether the mine is under this Act or not). Nor may he have an interest in any mine in his district (s. 40).

An inspector has power (1) to ascertain whether the Act is complied with, both above and below ground; (2) to enter and inspect the mine at all reasonable times by day or night: (3) to examine its condition, ventilation, special rules, and everything relating to the safety of the workmen, and the treatment of animals used, etc. Obstruction of an inspector is an offence (s. 41).

Any danger or defect in a mine must be intimated by the inspector to

the owner, agent, or manager; and if not remedied, must be reported to the Secretary of State. If the owner objects to remedy, the matter is to be determined by arbitration. If an owner, not objecting, fails to remedy the defect within 10 days, or, in the case of arbitration, fails to comply with the award within the time fixed, he is guilty of an offence: but the Court has discretion in convicting, if reasonable diligence is used to comply (s. 42). [These provisions apply only to matters which it is in the owner's power to remedy (*Spon Lane Colliery Co.*, 1878, 3 Q. B. D. 673).] An inspector must make an annual report to the Secretary of State, who may also order him to make a special report upon any accident which has caused loss of life or personal injury (ss. 43, 44).

The Secretary of State may order a formal investigation of any explosion or accident; and (1) the Court may consist of any competent person, with or without assessors having legal or special knowledge; (2) the inquiry must be held in open court; (3) the Court is to have all the powers of a Sheriff when trying offences against the Act, all the powers of an inspector, and also power (*a*) to enter and inspect, (*b*) to summon witnesses and require answers and returns, (*c*) to require production of documents, etc., (*d*) to administer oaths and exact signed declarations from witnesses; (4) expenses of witnesses are to be allowed; (5) the Court is to report to the Secretary of State; (7) any person failing to attend, after tender of expenses, or obstructing the Court, is liable to a fine of £10, and £10 for each day of failure to produce any document or return ordered by the Court (s. 45). The report of the Court may be published by the Secretary of State (s. 46).

Arbitration.—The parties to an arbitration under the Act are the owner, agent, or manager of a mine on the one hand, and the inspector (on behalf of the Secretary of State) on the other. An arbitrator must be a practical mining engineer, or a person accustomed to the working of mines. The arbitrators appoint an umpire, who must be a Sheriff or Sheriff-Substitute; they may examine witnesses on oath, and consult any counsel, engineer, or scientific person. For detailed regulations as to their appointment and procedure, reference may be made to the Act (ss. 47, 76).

PART II.

Rules.

General Rules.—The Act provides a code of General Rules to be observed, so far as reasonably practicable, in every mine [*i.e.* "reasonably practicable" with reference to physical or engineering difficulties, not to the difficulty of working the mine to profit (*Wales*, 1885, 16 Q. B. D. 340)]. They are here shortly summarised: for details reference may be made to the Act.

1. Sufficient ventilation must be produced to dilute noxious gases.

   [A complaint in respect of defective ventilation must specify the particular defect in the system (*Roberts*, 1890, 18 R. (J. C.) 8).]

2–3. Precautions to be taken where fires or mechanical contrivances are used to produce ventilation.

4. All workings must be inspected before the commencement of each shift, and a report thereon entered in a book accessible to the workmen. An inspection must also be made during each shift.

5. Machinery above and below ground must be examined every 24 hours, and the shafts every week. A report of both the daily and weekly examinations must be entered in a book (*Scott*, 1895, 1 Q. B. 9).

6. Entrances to unused workings must be fenced.

   [A workman who had gone through such an unfenced opening, in search of better coal, and was injured, held to have a relevant

ground of action (*Hogg*, 1886, 24 S. L. R. 14; see also *Simpson*, 1874, 3 Coup. 26).]

7. Workmen must be withdrawn from dangerous workings, and not readmitted until they are safe.

8–11. *Safety Lamps.*—Only locked safety lamps may be used where there is likely to be a dangerous quantity of inflammable gas. Construction of safety lamps, and regulations for their examination and use.

12. *Explosives.*—These must not be stored in a mine. Not more than 5 lbs., in secure case, may be taken down. Forbids the use of iron or steel prickers, or coal dust for tamping. Precautions to be taken in blasting.

[See *Cook*, 1886, 14 R. 1, as to injury arising from use of steel pricker.]

[Where a magazine is kept for the purpose of any mine, the Secretary of State may direct an inspector under the Mines Act to act as inspector under the Explosives Act; and such inspector shall have powers under both Acts (Explosives Act, 1875, s. 59).]

13. Precautions against dangerous accumulations of water.

14. Signalling apparatus, and manholes at intervals of not more than 20 yards, must be provided for all travelling planes worked by machinery and over 30 yards in length.

[Manholes may be alternately on opposite sides of the plane (*Wilson*, 1883, 10 R. 1021).]

15. Every road where horses are used must have manholes every 50 yards.

[Mouth of cross road equivalent to manhole (per L. J. Clerk in *Hughes*, 1891, 19 R. 343).]

16. Manholes must be kept clear.

17. Roads worked by animals must be of sufficient height.

18. The top of every shaft which is out of use must be fenced.

19. The top and all intermediate entrances of every shaft must be fenced, unless during repairs.

[*M'Gill*, 18 R. 206, as to breach of this rule; *Simmerton*, 13 R. 1012.]

20. Where the strata are unsafe, every shaft must be made secure.

21. The roof and side of every travelling road and working place must be made secure.

22. Timber must be provided for timbering working places; and the distance between the holding props must not exceed 6 feet.

23. Workmen are to have option of using downcast shaft, where there is one.

24. The engineman for working the lowering and raising machinery must be 22 years of age, and must be on duty when workmen are below ground; and every engine, etc., used for conveying persons in the mine must be under control of a competent man not under 18.

25. Guides and signalling apparatus must be provided in all working shafts exceeding 50 yards in depth, unless exempted. (This rule applies to a shaft being used by workmen, although the minerals are not yet gotten. Foster, 1891, 1 Q. B. 71.)

26. Speed of raising must not exceed 3 miles an hour beyond given point, where there is no contrivance to prevent overwinding.

27. Every cage must be provided with a cover, unless where windlass is used, or where persons are working in the shaft, or where exemption granted by inspector.

[A miner ascending in a "skip" for ore, instead of the cage, was held guilty of a breach of this rule (*Frecheville*, 1883, 48 L. T. (N. S.) 612).]

28. Use of single linked chain forbidden.
29. Drum to be provided with flanges to prevent rope slipping.
30. Breaks and indicator to be attached to machinery.
[Pumping gear is not a "break," though used as such (*Nimmo*, 1872, 10 M. 477).]
31. All fly-wheels and dangerous machinery must be fenced.
32. Steam boilers must have proper safety valves and gauges.
33. Barometer and thermometer must be kept above ground near entrance to mine.
34. Ambulances and other appliances must be kept in readiness.
35. Prohibition against wilful damage.
36. Every workman must obey directions and special rules.
37. Mine books to be open to inspector and workmen.
38. Mine may be examined monthly by working miners selected by workmen. If they report danger, the owner must communicate it to the district inspector.
39. No person not now employed as a miner may work alone as a coal or ironstone getter in face of the workings without 2 years' experience under skilled workmen.

Contravention of the foregoing rules is an offence—by whomsoever committed: the owner, agent, or manager is held guilty, unless there be proof that all reasonable means were taken to prevent it (s. 50).

It has been held that convictions may be obtained against—

One of several owners, though others are not summoned (*Brown*, 1857, 7 *E. and B.* 757). A manager with £1 a week, for defective condition of a mine, which would have cost £200 to remedy (*Hall*, 1879, 49 L. J. M. C. 17). A working miner (*Frecheville*, 1883, 48 L. T. (N. S.) 612). A part owner, taking no part in the management of a mine, which is under a qualified manager (*Baker*, 1878, 3 Ex. D. 132; *Bell*, 1891, 55 J. P. 535). A managing director, under whom was a certificated manager, was held an "agent," but not responsible for permitting the mine to be worked with naked lights (Stokes, 1893, 5 R. (Q. B. D.), 240).

Special Rules.

Special rules for safety and discipline are to be established in every mine, and signed by the inspector. Contravention thereof is an offence (s. 51).

For procedure in framing, approving, and amending special rules, which are subject to objection by the Secretary of State, and may be referred to arbitration, reference is made to ss. 52–6.

Publication of Abstract of Act and Special Rules.

An abstract of the Act, supplied by the district inspector, and a copy of the special rules, must be posted in a conspicuous place, and the same must be supplied gratis on workman's application.

[Delivery of a copy is not a condition precedent to the right to enforce the special rules (*Higginson*, 1869, 19 L. T. (N. S.) 690).]

Non-compliance therewith is an offence, but the owner, etc., may prove that reasonable means were used to comply (s. 57).

Defacing notices posted under the Act is an offence (s. 58).

PART III.

Supplemental.—Legal Proceedings.—Every workman who commits an act which would be an offence in the case of an owner, agent, or manager, is guilty of an offence.

The penalty, where not prescribed, is, for owner, etc. (including under-manager), £20; any other person, £2. Where the inspector has given written notice of an offence, a further fine of £1 for every day thereafter (s. 59).

Every person who is wilfully or negligently guilty of an offence calculated to endanger life or limb is liable to 3 months' imprisonment, with or without hard labour (s. 60).

All offences not declared crimes and offences, and all fines and costs recoverable as fines, may be tried and recovered summarily before the Sheriff; this applies also to proceedings for removal of a check-weigher (s. 61).

All complaints must be brought within 3 months; the accused may be sworn and examined (if he choose); and minutes of evidence are to be taken, if required by either party (s. 62).

Where a child under age is employed on the representation of its parent or guardian that it is of sufficient age, or where an unqualified workman has worked alone as a coal or ironstone getter on his representation that he was qualified (under rule 39), the owner, etc., is exempt, and the person making the misrepresentation is guilty (s. 64).

No prosecution against any owner, etc., for an offence not committed personally, may be instituted except by an inspector, or with written consent of the Secretary of State; and where the inspector is satisfied that reasonable means have been taken to prevent an offence, he is not to prosecute (s. 65).

Where an owner, etc., has taken proceedings against any workman for an offence, he must report the result of the trial to the inspector within 21 days (s. 66).

Application of Act to Scotland.—The Court of summary jurisdiction is the Sheriff, or Sheriff-Substitute, who has all necessary powers.

In default of payment of fines or costs decerned for summarily, 3 months' imprisonment may follow.

An appeal from conviction by the Sheriff is competent only to the Circuit or High Court of Justiciary, in terms of 20 Geo. II. c. 43 (s. 67).

Notices of explosions, accidents, etc., are to be deemed sent to the inspector on behalf of the Lord Advocate.

The Education Acts are not to be affected (s. 76).

Saving of proceedings under indictment, or under other Acts, provided no person is punished twice. The Court may adjourn a case to enable other proceedings to be taken (s. 68).

No person interested in a mine, or near relative of such, may act as judge in trying an offence, except of consent (s. 69).

Fines imposed for neglect to intimate an explosion or accident, or for an offence causing loss of life or personal injury, may be distributed by the Secretary of State among the injured persons or relatives of persons killed, provided these persons did not cause or contribute to the accident. Such payment is not to affect legal proceedings in respect of the same accident (s. 70).

Miscellaneous.

Orders or exemptions by the Secretary of State may be altered from time to time (s. 72).

Notices under the Act may be served personally or by post (s. 73).

The Coal Mines Regulation Act, 1896, amends the principal Act in several particulars. The powers under sec. 51 to propose special rules for

safety against explosion are enlarged and detailed. Special rules so made are to supersede any general rule, or any special rule already made which is inconsistent therewith (s. 1). Workmen may be represented at arbitrations on giving security for costs to the satisfaction of the arbiter, and the person appointed may be made liable in costs (s. 2). Additional details in the plans to be kept and furnished under secs. 34 and 38 of the principal Act are required; and the Court of Session may, on application by the Secretary of State, order any person having a plan of an abandoned mine to produce it for inspection or copying (secs. 3, 4). Inspection under sec. 49, Rule 4 (i.) is to extend to places where work is temporarily stopped: no lamps, other than safety lamps provided by the owner, may be used; and sec. 49, Rule 12, is altered, so as to read that "only clay or other non-inflammable substance shall be used for stemming, to be provided by the owner" (s. 5).

A Secretary of State may prohibit or regulate the use of any explosive which he deems dangerous, or likely to become so (s. 6).

It is to be noted that the Truck Acts, 1831 to 1896, apply to persons employed in or about the workings of coal mines (1 and 2 Will. IV. c. 37, s. 19).

[Chisholm, *Manual of Coal Mines Regulation Act*; Ross Stewart, *Mines and Minerals*.]

Cock-fighting.—This sport is now prohibited in Scotland, under penalties, by the Cruelty to Animals (Scotland) Act, 1895 (58 Vict. c. 13). The previous history of legislation and decision on the subject may be briefly stated. The Cruelty to Animals (England and Ireland) Act, 1849 (12 & 13 Vict. c. 92), and the Cruelty to Animals (Scotland) Act, 1850 (13 & 14 Vict. c. 92), each contained a general provision against cruelty to animals in almost similar terms, making it an offence inferring a penalty of £5 for any person to "cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, overdriven, abused, or tortured, any animal," and defined the word animal to be "taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal." These Acts also each contained a provision making it an offence to "keep or use or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature," or to "encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid." The Court of Queen's Bench in 1863 held, in the case of *Budge* (3 B. & S. 379), that to assist in fighting cocks, except in a place kept for the purpose, was not an offence under the latter section, but, in the case of *Budge* (3 B. & S. 382), that a person who set his cock to fight another after the other had been disabled by its thigh-bone being broken, was an offence against the general section against cruelty. The Court of Justiciary in Scotland, in the case of *Brown* (1891, 3 White, 83), followed the first case of *Budge* in holding that the section against cock-pits did not apply to cock-fighting in places not kept for the purpose; but in the case of *Johnston & Others* (1892, 3 White, 432), the same Court, sitting with a full Bench, refused to follow the second case of *Budge*, holding that the definition of animal in the Act of 1850 did not include a cock, and accordingly that cock-fighting was not struck at by the general enactment against cruelty. The Act of 1895 has amended the definition of "animal" in the Act of 1850 by adding the words

"or any game or fighting cock or other domestic fowl or bird," and has made it penal to assist at a cock-fight. It is proper to notice that, while the decision in *Budge* proceeded on an interpretation of the definition of "animal" in the Act of 1849, against which much may be urged, that definition had at that date been amended by the English Act of 1854 (17 & 18 Vict. c. 60), which was not cited in the case, and which extended the definition of animal so as to include animals whether quadrupeds or not.

Co-Defender.—The Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86), s. 7, gave a husband who was pursuer of a divorce for adultery the right to cite the alleged paramour as a co-defender along with the wife. He may be examined as a witness, but is not "liable to be asked, or bound to answer, any question tending to show he has been guilty of adultery," unless he has given evidence in disproof of such adultery (37 & 38 Vict. c. 64, s. 2). It is not competent to prove his loose conduct with other women as tending to prove his adultery with the defender (*King*, 1842, 4 D. 590). If adultery with him is proved, he may be found liable in the whole or part of the expenses, taxed as between agent and client (24 & 25 Vict. c. 86, s. 7), including sums advanced by the husband to the wife for her expenses (*Munro*, 1877, 4 R. 332). It is in the power of the Court to dismiss him from the action on cause shown, "if in their opinion such a course is conducive to the justice of the case" (s. 7, *ut supra*; *Miller*, 1863, 2 M. 225). He will not be found liable in expenses if the woman was a prostitute (*Miller, ut supra*; *Nelson*, 1868, L. R. 1 P. & D. 510), or if he did not know, and had no reason to suppose, that she was a married woman (*Kydd*, 1864, 2 M. 1074). He may be refused expenses if his conduct with the wife has been discreditable, though adultery with her is not proved (*Collins*, 1882, 10 R. 250, 11 R. (H. L.) 19; *Edward*, 1879, 6 R. 1255; *Laidlaw*, 1894, 2 S. L. T. 187). But if the husband is shown to have been grossly careless in exposing his wife to temptation, he may not be found entitled to all his expenses from the co-defender though adultery is proved (*Codrington*, 1865, 34 L. J. P. & M. 60; *Badcock*, 1858, 1 S. & T. 189). Any ground of jurisdiction will be sustained against a co-defender which would make him liable to be sued in Scotland for a personal debt (*Fraser*, 1870, 8 M. 400). Damages may be asked against a co-defender in the summons of divorce, or in a separate action; and it is no defence that the pursuer has condoned the wife's guilt and taken her back (*Macdonald*, 1885, 12 R. 1327).

As to marriage of divorced wife with paramour, see ADULTERY; and see MARRIAGE; DIVORCE; EXPENSES.

[See Fraser, *H. & W.* ii. 1147; Walton, *H. & W.* 10, 43, 55, 198, 393.]

Co-delinquents.—Where several parties are jointly concerned in the committal of a wrong, they are liable *singuli in solidum* to the person injured (*Ferguson*, 1842, 1 Bell's App. 696; *The Avon*, L. R. P., 1891, 7), and the person injured may raise an action and recover his whole damage from any one of them (*Palmer*, 1894, 21 R. (H. L.) 39). The plea of all parties not called, which may be stated in contract, is not applicable in delict (*Croskery*, 1890, 17 R. 697; *Western Bank*, 1860, 22 D. 476, 477). In contract also the discharge of one obligant releases all the others, though they are not parties to the discharge; but in delict such a discharge will not liberate the others, unless it appears that the pursuer has granted the discharge as in full satisfaction of his damage (*Campbell*,

1891, 19 R. 282; *Delany*, 1893, 20 R. 509; *Western Bank*, 1862, 24 D. 859, 912).

A person may be liable as a joint wrong-doer, on the ground of being *versans in illicito*, although the immediate cause of the injury is not his act. In this way there have been held liable one of two persons who, riding furiously on a high road, collided with a foot-passenger (*McLauchlan*, 1823, 2 S. 590 or 506); one of a rowdy gang who broke a street lamp (*Smith*, 1800, Hume, 605); the owner of one of several dogs on a sheep-worrying excursion (*Murray*, 1881, 19 S. L. R. 253). So also one party contributing to the creation of a nuisance may be interdicted from continuing his pollution, although it by itself would not amount to a nuisance (*Buccleuch*, 1866, 5 M. 214); but each is liable only for the damage caused by himself (*Buccleuch*, 1876, 4 R. (H. L.) 14, 16). If each party is acting independently, and his action produces a separate result, as in illegal stake-net fishing by different proprietors, all are not regarded as *versantes in illicito*, and there is no joint liability (*Athole*, 20 June 1822, F. C.).

Relief amongst co-delinquents is said not to exist. This rule, however, is applicable only in the case of delict proper, such as an offence against the criminal law, or of a quasi-delict, *quod sapit naturam delicti*. It does not apply to the case of co-delinquents whose acts or omissions are not tainted with fraud or other moral delinquency (*Palmer*, 1894, 21 R. (H. L.) 39, 41). The right of recourse will be available to delinquents who have been found liable on the ground of negligence, and relief will be allowed proportionately. [See Stair, i. 9. 5; Ersk. iii. i. 15.]

Codex.—This term was used generally to denote a book, more especially a book which contained a variety of matters, *e.g. codices accepti et expensi*. So it came to be applied to books containing collections of law.

In the later Roman Empire, before the time of Justinian, several collections of law were made, all of which were known as *codices*, whether made by private individuals or by public authority. The more important of these pre-Justinianian compilations of law were: (1) the *Codex Gregorianus*, a collection of early imperial ordinances made by one Gregorianus, of whom nothing else is known, and published about 300 A.D.: (2) the *Codex Hermogenianus*, a later collection, supplementing the former, and published in the course of the fourth century: (3) the *Codex Theodosianus*, published in 438 A.D., by Theodosius II., Emperor of the Eastern Empire, and promulgated with statutory force in the Western Empire by Valentinian III., in the course of the same year. This code, which is by far the most important of the pre-Justinianian compilations, contained the imperial constitutions issued since Constantine. The constitutions are arranged in chronological order, under titles and rubrics, in sixteen books. The first five books contain most of the enactments relating to private law. The sixth to the eighth books consist principally of constitutional and administrative ordinances; the ninth is concerned with criminal law: the tenth and eleventh, with the financial system of the Empire; the twelfth to the fifteenth, with the constitutions and privileges of municipalities and other corporations; the sixteenth, with the church. The result of the Theodosian code was to secure, to a large extent, uniformity of law in the Eastern and Western Empires. As regards the code of Justinian (*Codex Justinianus*), see CORPUS JURIS CIVILIS; ROMAN LAW.

Mention may also be made of the compilations of Roman law made by the barbarians who overthrew the Western Empire. *Leges Romanæ* of

this kind were published in three Germanic States: (1) the *Edictum Theodorici* of Theodoric the Great, the *Lex Romana* of the Ostrogoths; (2) the *Papian*, or *Lex Romana* of the Burgundians; and (3) the *Breviarium Alarici*, or *Lex Romana*, of the Visigoths, issued by Alaric II. in 506 A.D. The Roman *Breviarium Alarici* became ultimately the *Lex Romana* of the whole of Western Europe, and, down to the eleventh century, exercised a dominant influence in the development of continental jurisprudence.

Codicilli.—*Codicilli*, in Roman law, denoted an informal will. When first recognised as binding under Augustus, they were in the nature of memoranda or instructions by the deceased to his heir, and were employed chiefly for the creation of *fideicommissa*. With the progress of the law and the annihilation of the distinction between *legata* and *fideicommissa*, certain forms were gradually made essential to the validity of *codicilli*. Finally, in the Justinianian law, the formal requirements of a codicil were the same as those of a will—both could be competently executed either orally or by writing—except that, in the case of a codicil, five witnesses were sufficient, and the seals of the witnesses might be dispensed with (Cod. 6. 36). A codicil could be executed without any will (*codicilli ab intestato*), or in addition to a will (*codicilli testamentarii*). A codicil of the latter class might, or might not, be confirmed antecedently or subsequently by the will, and at one period this distinction involved important differences in the legal effect of the codicillary provisions (Gaius, ii. 270; Ulpian, *Reg.* 25. 8; *Dig.* 26. 2. 3 pr.). It was usual for wills to contain a *clausula codicillaris*, in which the testator intimated his wish that, if the will should prove invalid on any ground, it should have force as *codicilli* (*Dig.* 28. 1. 29. 1; 31. 87. 17). Such a declaration was effectual, and bound the intestate heirs. The power to make *codicilli* was the same as the power to make a testament. [On the whole subject see *Dig.* 29. 7; *Inst.* ii. 25.] See FIDEICOMMISSUM.

Codification.—*Attempts to codify the Law of Scotland before the Union.*—The Roman Codes have been treated in a separate article, and the subject of codifying the law of Scotland, either by itself or along with the law of England, belongs to the future, though probably not quite so distant a future as was at one time contemplated. The present article is confined to a statement of the attempts to codify in whole or part the law of Scotland prior to the Union, and the law of Great Britain, including Scotland, since the Union.

By the Act of James I., 1425, c. 54, it was ordained "that sax wise men and discrete of ilke ane of the thre Estatis quhilk knawis the lawis best sall be chosen, sen (since) fraude and guile aucht to help na man, that sall see and examine the Buiks of Law, that is to say, Regiam Majestatem and Quoniam Attachiamenta, and mend the laws that need mendment."

This was a proposal not of a code, but rather for the revision of the existing code of law, chiefly feudal, contained in the two law books mentioned, which Scotland had borrowed from Glanvillis *Tractatus de Legibus* and other English law books of the 12th century.

In 1469 the Parliament of James III. appointed a commission of four members of each Estate, by which the king's laws *Regiam Majestatem Quoniam Attachiamenta*, Actis, Statutis, and other bukis, were to be put into a (*i.e.* one) volume, and the laif (*i.e.* the rest) to be destroyit. This is an exact description of a code, though the drastic measure of destroying the

older books of the law, often threatened, has never been carried out. John Leslie, Bishop of Ross, in the reign of Mary Stuart obtained a commission to "certain learned, wise, and expert men, who best knawis the lawis, to visyê, sycht, and correct the lawis of this Realm, sa that na uther but the said lawis, sychtit, mendit, and corrected be her said trusty counsalaris and commissionaris, or ony sax of them conjunctly, sal be by her privilege imprentit, or have any place, faith, or authoritie to be allegit and rehersit afore any of her jugis or justicis quhat somever." In 1574 the Regent Morton appointed a commission to "visite the bukis of the Law Actis of Parliament and Decisionis before the Session (*i.e.* Court of Session), and draw the form of the body our lawis quhair throu there may be a (*i.e.* one) certain written law to all our Soveraign Lordis Judgis and Ministeris of Law to judge and decide by." This was a project for a Scottish Code, with the reasons for desiring it clearly stated. It was the first of such projects which proposed to embody the decisions of the Court of Session. Charles I. issued a commission with the same object in 1628, which the Scottish Parliament approved in 1633, and a more ample commission was issued in 1649, of which Lord Fountainhall expressly says that it was in imitation of Justinian, who employed ribonian and certain other lawyers to renew the books of the law in his time, and who compiled from them the *Corpus Juris* we now use. None of these commissions produced a code; and with regard to a later, and the last, Scottish commission in 1681, Fountainhall observes: "It may be useful if it takes effect, and those concerned agree or do not weary for want of Salary to recompense their pains." These successive commissions show plainly the strong desire of Scotland for a code, and some of the causes of their failure are equally clear. The times were too troubled for such a measure, and no sufficient provision had been made for the cost of the preparation of a code. Though it was possible to have a code for a small country as early as the 17th, and even the 16th or 15th century, as was shown by the example of Denmark, which perhaps stimulated Scottish legislators, it is also evident that such a code would not have corresponded to the circumstances of modern business and social relations, and would have had to be to a large extent rewritten.

Modern Attempts to codify the Law of Scotland.—The union with England put a stop to the attempt to codify the law of Scotland, and for a time to the desire to do so, lest the law of Scotland secured by the Treaty of Union should be injured. This desire revived owing to the writings of Bentham and the many successful attempts to codify made successively in all the countries of Europe from the time of Frederick the Great of Prussia to that of the present Emperor of Germany. The English colonies and dependencies, and the British Indian Empire, followed the continental example. The Code Napoleon, so largely adopted in, or adapted to, other countries: the various Indian Acts on contracts, limitations, procedure, both civil and criminal, evidence, etc., in substance partial codes, or sections of a code, and amounting together to a complete code applicable to the great variety of races and languages in India subject to the British Empire, as well as to English residents within it; and the two German Codes, one for mercantile law (Allegemeines, Handel's *Gesetzbuch*), published in 1881, which contains the whole mercantile law, except bills, already codified in 1848, and the other for civil law generally, so recently passed as July 1896—are the most important examples of the modern codes of this century.

Great Britain, though the birthplace of Bentham, has begun its codification later, at a slower pace and according to different methods; and what has been done for Scottish law has been done in concert with England, and

to a large extent with the result of assimilating, as well as codifying, the law of the two countries. In England a commencement was made by two processes, both of which have been slow but useful. One was the revision of the Statute Book by a committee of judges, lawyers, and officers of State, who employed younger lawyers at small salaries to revise the Statute Book, by striking out obsolete, redundant, repugnant, and superfluous provisions. By this means the Statutes at large down to 1867 were reduced from eighty-five volumes to eleven volumes. The early Scottish Statutes have not yet been revised, though a proposal to this effect was submitted, at the suggestion of the Statute Law Revision Committee, to that committee by the present writer in 1894.

The other process was the consolidation of Statutes in one or more Acts, which, although carried out under that name only perhaps by Sir R. Peel in the Statutes called "The Criminal Law Consolidation Acts," or, after him, Peel's Acts. They consolidated the criminal law of England (7 & 8 Geo. IV. c. 27–9), and do not apply to Scotland. But consolidation has practically been adopted in many larger Statutes dealing with some special branch of law, *e.g.* The Factory Acts, The Merchant Shipping Acts, The General Police Acts, and The Public Health Acts.

In 1882 a further step was taken, which will probably date as the commencement of codification proper in England and Scotland, just as the modern codification in Germany commenced with the Allegemeine Werksel Ordnung (Law of Bills of Exchange), agreed to at the Conference of Leipsic on 25th November 1848, and which became law by promulgation in the then separate German States between 1848 and 25th June 1850. Thirty-three years after, the English Act on the same subject (45 & 46 Vict. c. 61) received the Royal assent in 1883, and became law for England and Ireland, and, with one or two modifications, for Scotland. It was drafted by Mr. M. D. Chalmers, then a county court judge, now legal member of the Legislative Council for India, and after revision on the part of Scotland by Sheriff Dove Wilson, the author of a Scottish book on Bills of Exchange, and Mr. Asher, then Solicitor-General, now Dean of Faculty, a committee of the Faculty of Advocates, of which Mr. Vary Campbell was convener, as well as committees of other legal bodies, it was carried through Parliament, largely by the aid of Lord Herschell and Lord Watson in the House of Lords, and the law officers of the Crown in the House of Commons.

The success of this Act was followed, though after too long delay, by the Partnership Act of 1890 (53 & 54 Vict. c. 39), which was drafted by Sir Frederick Pollock, and applies both to England and Scotland, again with some modifications, and by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which was drafted by Mr. Chalmers, and also, with some more important modifications, applies to Scotland.

At present a Bill to codify Marine Insurance has been drafted and submitted to various bodies for revision, but was not sufficiently advanced to pass during the last session of Parliament.

[Jeremy Bentham, *Papers on Codification*, 1830; T. B. Macaulay, *Introduction to the Original Indian Code*, published 1837; Whitley Stokes, *Introductions to the Indian Codes of Substantive and Adjective Law*; Æ. J. G. Mackay, "Sketch of the History of the Law of Scotland," *Journal of Jurisprudence*, 1882; Mr. Dove Wilson, "The Proposed Imperial Code of Commercial Law," *The Juridical Review*, 1896, p. 329; M. D. Chalmers, Editions of *Bill of Exchange Act*, 1883, and *Sale of Goods Act*, 1893; Sir F. Pollock, Edition of *Partnership Act*, 1890.]

Cognate.—According to the Roman law, a person's cognates were those of his relatives who were connected with him by the interposition of one or more females; while his agnates were persons related to him through males only. Thus the son of a person's sister was a cognate, the son of a brother an agnate. But in the later Roman law cognate was used in a wider sense, and included all blood relations. Thus agnates were only a particular class of cognates. The *cognatic* family was the family of the *jus gentium*, the *agnatic* that of the *jus civile*. *Cognatio* had its foundation in natural relationship or consanguinity. It was created by blood, and could not be lost, whereas *agnatio* could be artificially created by adoption and marriage, and artificially lost in various ways by a person passing out of the *patria potestas*. In the law of Scotland the cognates of a person are those of his relatives who are connected with him through his mother. His kinsmen to whom he is related through his father are his agnates, even though they are connected with him through a female. A cognate is entitled to the custody of an orphan pupil in preference to the tutor-at-law (*Higgins*, 1821, 1 S. 49); and while the custody of the estate of a lunatic is given to his agnate, the custody of the person of a lunatic is usually given to the nearest cognate.

[Ersk. B. i. tit. 7, s. 4; 1 Bankt. 728; Stair, B. iii. tit. 4, ss. 8 and 34; Bell, *Prin.* s. 2078.] See TUTOR; LUNATIC; SUCCESSION.

Cognition of the Insane.—See BRIEVE; INSANITY.

Cognition and Sale.—A process brought in the Court of Session for obtaining judicial authority to sell the whole, or a part, of a pupil's heritable estate. The action proceeds at the instance of the pupil and his tutors; the defenders being the persons entitled to succeed to the heritage on the pupil's death. The purpose of the action is to instruct the necessity, or great expediency, of a sale, in order to discharge the debts with which the property, or part of it, is burdened, and thus save the pupil from loss. The creditors are not called as defenders, but the summons contains a conclusion that they should be ordained to produce, and depone to the verity of, their grounds of debt; and they are accordingly cited, by diligence, in the process for that purpose, and in order to prove the burdens on the estate. The whole heritable property belonging to the pupil must be specified in the summons; in the condescendence the amount of his moveable funds should be set forth, and a full state of his affairs should be exhibited in the course of the action. A proof is taken subsequently, when the value of the property and the amount of the debts are laid before the Court. If satisfied, the Court authorises a sale of the whole, or part, of the pupil's heritage, by public roup, at a price not under the value proved in the process. The procedure is similar to that in RANKING AND SALE (*q.v.*), the final interlocutor being pronounced by the Inner House on the report of the Lord Ordinary (Mackay, *Manual of Practice*, 177). The sale is not judicial, nor is there any process to rank the creditors.

Although utility has been recognised as sufficient ground for decree in an action of cognition and sale (*Plummer*, 1757, Mor. 16358), it is doubtful if anything less than necessity would now be held enough (*Vere*, 1804, Mor. 16389; *Finlayson*, 22 Dec. 1810, F. C.). In *Campbell* (1880, 7 R. 1032), where tutors petitioned for power to feu, on the ground of "benefit, and necessary for the proper administration of the

estate," the Court granted the petition in respect that "great loss would be incurred if we did not do what is asked," the Lord President (Inglis) remarking (p. 1034): "The true test of the safety and propriety of granting such an application is the consideration whether there is an urgent necessity for the step in order to avoid loss, it not being enough that the fact of granting the power would procure advantage to the estate."

The action of cognition and sale is now comparatively rare, being to a great extent superseded by summary petition (see *White*, 1855, 17 D. 599); but it has been said to be the expedient course for tutors to follow, except in cases of urgent necessity (L. Ivory in *Mackenzie*, 1853, 16 D. 60, and L. Curriehill in *White*, *ut supra*). It is to be noted, however, that by sec. 2 of the Trusts Amendment Act, 1884, "trustee" shall include tutor, in the construction of the Trusts (Scotland) Acts, 1861 to 1884; and it would appear, therefore, that tutors can now apply for special powers on the same grounds and in the same manner as trustees.

[*Juridical Styles*, iii. 200; Mackay, *Practice*, i. 362; Mackay, *Manual*, 177; Bell, *Com.* ii. 239; Bell, *Prin.* 2084; Ersk. i. 7. 17; Shand, *Practice*, ii. 940; Menzies, *Conveyancing*, 32,782; M. Bell, *Conveyancing*, ii. 829.] See JUDICIAL FACTOR; TRUSTEE.

Cognition and Sasine.—See BURGAGE.

Cognitionis Causa.—See CONSTITUTION, DECREE OF.

Cohabitation.—See MARRIAGE: DIVORCE; DESERTION, JUDICIAL SEPARATION.

Coin.—See MONEY; COINING.

Coining.—By the old customary law of Scotland, coining offences were punished capitally. Frequently, but not invariably, such offences were prosecuted as treason. Crimes relating to the coin were also dealt with by the Acts 1449, c. 29; 1469, c. 40; 1540, c. 99; 1540, c. 124; 1563, c. 70; and 1696, c. 42. The last-mentioned Statute was passed to remove doubts as to what was the proper penalty for clipping foreign money, and vending it for good after it had been clipped. The Act made this a capital offence, but it at the same time declared that coining offences were no longer to be punished as treason. The Act 7 Anne, c. 21, which communicated to Scotland the treason laws of England, again raised all high offences against the coin to the rank of treason. But by the law of England only the graver coining offences were treasonable. Less heinous offences against the coin—such as coining copper money, uttering false British coin, coining or lightening foreign money—were not treasonable under English law; and so, in Scotland, offences such as these were punished by an arbitrary sentence.

In 1861 an Act was passed (24 & 25 Vict. c. 99) to consolidate and amend the Statute law of the United Kingdom against offences relating to the coin, and prosecutions against coiners now proceed under this Act. The chief provisions of the Act are these:—

I. *Interpretation Section* (s. 1).—Various definitions are given in this section—

"The Queen's current gold or silver coin" includes any such coin coined in any Royal mint, or lawfully current in any part of the Queen's dominions.

"The Queen's copper coin" includes any copper coin, and any coin of bronzed or mixed metal coined or current as above.

"False or counterfeit coin" includes current coin tampered with so as to resemble any of the Queen's current coin of a higher denomination.

"The Queen's current coin" includes any coin coined in a Royal mint, or lawfully current by proclamation in any of the Queen's dominions.

"Having in custody or possession" includes knowingly having in the possession of another, or in any place, whether belonging to or occupied by the person accused or not, or whether he have the thing for his own use or that of another (*Murray and Carmichael*, 1841, 2 Swin. 559; *Sutherland and Gibson*, 1848, J. Shaw, 135).

II. *Offences under the Statute.*—1. *Crime and Offence.*—First offence of knowingly uttering base foreign gold or silver coin (s. 20).

Punishment.—Six months' imprisonment, with or without hard labour.

2. *Crime and Offence.*—(1) First offence of knowingly uttering base British gold or silver coin (s. 9). (2) Uttering as British gold or silver coin, any coin, medal, etc., which is of less value than the coin it is passed off for (s. 13). (3) Uttering base British copper coin (s. 15). (4) Having three or more base British copper coins, with intent to utter (s. 15). (5) Defacing any British current coin by stamping names or words upon it (s. 16). (6) First offence of making base inferior coin (s. 22).

Punishment.—One year's imprisonment, with or without hard labour, or solitary confinement.

3. *Crime and Offence.*—(1) Exporting any counterfeit British current coin without lawful authority (s. 8). (2) Uttering base British coin, and either (*a*) having in possession any other counterfeit British current gold or silver coin, or (*b*) on the same day, or within ten days next ensuing, committing another offence of uttering base British coin (s. 10). (3) A second uttering of base foreign gold or silver coin (s. 21).

Punishment.—Two years' imprisonment, with or without hard labour, or solitary confinement.

4. *Crime and Offence.*—Knowingly possessing three or more base British gold or silver coins, with intent to utter them (s. 11).

Punishment.—Five years' penal servitude (27 & 28 Vict. c. 47, s. 2), or two years' imprisonment, with or without hard labour, or solitary confinement.

5. *High Crime and Offence.*—(1) Unlawfully possessing gold or silver taken from British coin (s. 5). (2) Making base British copper coin (s. 14). (3) Making, mending, buying, selling, or having in one's custody or possession instruments for counterfeiting British copper coin (s. 14). (4) Dealing in base British copper coin (s. 14). (5) Making base foreign gold or silver coin (s. 18). (6) Unlawfully bringing into Britain base foreign gold or silver coin (s. 19). (7) Second offence of making base foreign inferior coin (s. 22).

Punishment.—Seven years' penal servitude, or two years' imprisonment, with or without hard labour, or solitary confinement.

6. *High Crime and Offence.*—Lightening British current gold or silver coin, with intent that it may thereafter pass for British current coin (s. 4.)

Punishment.—Fourteen years' penal servitude, or two years' imprisonment, with or without hard labour, or solitary confinement.

7. *High Crime and Offence.*—(1) Making base British gold or silver coin (s. 2). (2) Gilding or silvering base British coin, or pieces of metal, with

intent to coin the same into counterfeit coin (s. 3). (3) Gilding or colouring British current silver coin, with intent to make it pass for British current gold coin (s. 3). (4) Gilding or silvering or colouring British current copper coin, with intent to make it pass for British current gold or silver coin (s. 3). (5) Dealing in base British gold or silver coin (s. 6). (6) Unlawfully importing base British gold or silver coin (s. 7). (7) An offence of (*a*) uttering base British gold or silver coin; or (*b*) uttering base British gold or silver coin, aggravated by possession of another base coin, or by committing a similar offence within ten days; or (*c*) possessing three or more base British gold or silver coins, by a person previously convicted of any of these offences, or of any high crime and offence under this or any previous Act relating to the coin (s. 12). (8) A third offence of uttering base foreign gold or silver coin (s. 21). (9) Making or mending, or beginning or proceeding to make or mend, or buying or selling, or having in one's custody or possession, instruments for cutting or stamping British or foreign gold or silver coin (s. 24). (10) Unlawfully conveying instruments or metals from any Royal mint (s. 25).

Punishment.—Penal servitude for life, or two years' imprisonment, with or without hard labour, or solitary confinement.

Completed Counterfeiting.—Sec. 30 provides that "every offence of falsely making or counterfeiting any coin, or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter, or put off, any false or counterfeit coin, against the provisions of this Act, shall be deemed to be complete, although the coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered, or put off, or offered to be bought, sold, received, paid, uttered, or put off, shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected." (See *Logg*, 1839, 2 Swin. 280.)

Uttering.—The Statute does not require that a counterfeit coin shall be uttered as genuine. (See *Brown*, 1833, Bell, *Notes*, 131; *Mooney*, 1851, J. Shaw, 509.) The repeated tendering of the same coin does not amount to the aggravation of repeated uttering in the sense of sec. 10 of the Act. The coin uttered on the second occasion must be different from that uttered on the first (*Anderson*, 1861, 4 Irv. 5). A charge of possession of coins cannot be made under the Act if a charge of uttering the same coins has also been made (*Weir and Hull*, 1864, 4 Irv. 465).

Indictment.—If a person is accused of two separate acts, one a crime and offence, the other a high crime and offence under the Act, they may be charged cumulatively (*Davidson and Francis*, 1863, 4 Irv. 292; *Wilsons*, 1866, 5 Irv. 302). But it is thought that if a person is charged cumulatively with a crime and offence and a high crime and offence where only one act of contravention of the Act has taken place, the charge is a bad one (Macdonald, 109; see *Forbes*, 1835, Bell, *Notes*, 133; *Brown*, 1837, *ib.*; *Robertson*, 1837, *ib.*; *M'Adam*, 1847, Ark. 326; *Watson*, 1858, 3 Irv. 306; *Mullens*, 1886, 1 White, 306).

[Hume, i. 561; Alison, i. 451; Ersk. iv. 4. 22; Macdonald, 101; Anderson, *Criminal Law*, 136.]

Collaborateur.—See Fellow-Workmen.

Collateral Security.—The term "collateral security," which is not a technical term in the law of Scotland, is generally employed to

denote a right in security granted by a debtor, and consisting of the personal obligation, or a right over the estate, of a third party. Thus, where the drawer or endorser of a bill discounts it with a bank, and assigns to the bank a security he has received from the acceptor, the security is commonly spoken of as collateral.

In Bankruptcy.—The importance of the distinction between collateral securities, as above defined, and securities granted by an obligant over his own estate, is found in the ranking on the bankrupt estate of the debtor. Although at common law a secured creditor is entitled to be ranked for his whole debt on the general estate (Bell, *Com.* (M'L. ed.) ii. 419; *Kirkaldy*, 1841, 4 D. 202; *Molleson*, 1884, 11 R. 415), yet in processes of sequestration or cessio, or in the liquidation of a company, a creditor is bound to value and deduct from his debt any security which he holds over the estate of the bankrupt, and is only entitled to be ranked for the balance (Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), s. 65; A. S. 1882, s. 7; 49 Vict. c. 43, s. 4). If, however, the securities held by the creditor are collateral, and do not extend over any part of the estate of the bankrupt, the creditor is not bound to deduct them. Thus, where several obligants are bound for a debt, the creditor may rank on the estate of each one for his whole debt, subject to the limitation that he is not entitled, in all, to draw more that 20s. in the £ (Bell, *Com.* (M'L. ed.) ii. 416; and see CAUTIONARY OBLIGATIONS). Similarly, when the security covers a subject which does not belong to the bankrupt, it need not be deducted (*University of Glasgow*, 1882, 9 R. 643). The question whether a security is or is not part of the estate of a bankrupt, is to be solved by considering whether the subjects would, but for the security, have passed to the trustee as part of the general assets. Thus the date which is to be looked at, is the date of sequestration: and it is immaterial by whom the security was granted, or to whom the subjects belonged at the date of granting. Thus, if a debtor, after granting a security over property belonging to himself, should transfer the subjects covered by it to a third party, but continue liable for the debt, the creditor may rank in his bankruptcy without deducting the value of the security (*University of Glasgow, supra*). Conversely, if a third party grants a security as a collateral obligation, but the subjects over which it extends are afterwards acquired by the principal debtor, the creditor, in ranking on the estate of the latter, must value and deduct the security (*Royal Bank of Scotland*, 1882, 9 R. 679).

It is held that the terms of the 65th section of the Bankruptcy Act, 1856, by which a creditor is bound to value and deduct any "security over any part of the estate of the bankrupt," apply only to securities over subjects of which the actual property would, but for the security, have passed to the trustee. They do not cover securities over subjects to which a third party has an *ex facie* absolute title, even although the bankrupt has the ultimate beneficial right, because all that the trustee in bankruptcy acquires, in relation to such subjects, is a right to demand a conveyance from the party having the title of property to them (*British Linen Co.*, 1877, 4 R. 651; *Royal Bank of Scotland*, 1877, 15 S. L. R. 13). Thus the partner of a company granted a security, for a company debt, over subjects to which he had an apparently unqualified title. It was proved that he held the subjects in reality in trust for the company, but it was doubtful whether the creditor (a bank) had notice of the trust. On the bankruptcy of the company, the creditor was held to be entitled to rank on its estate without deducting the security, on the ground that the subjects thereof were no part of the bankrupt estate (*Royal Bank of Scotland*, 1877, 15 S. L. R. 13).

Collateral Securities on Bills.—The ranking on collateral securities may

often present difficulties in cases where two persons are liable for the same debt (for instance, on a bill), and a security, granted by one of them to the other, has been assigned by him to the common creditor. Thus A. receives an advance from B., accepts a bill for it, and grants a security in favour of B. B. discounts the bill with a bank, and assigns the security. On the bankruptcy of A. and B., the bank is entitled to rank for the debt on the estate of each, but the question arises, on which ranking is the security to be deducted? If the security originally conferred on B. an *ex facie* absolute title to the subjects, it is held that the subjects are part of his estate in bankruptcy, and not part of that of A., and therefore that the bank must value and deduct the security in claiming on the estate of B., and may rank for the whole debt upon the estate of A. (*British Linen Co.*, 1877, 4 R. 651). If the security is originally granted to B. by a title *ex facie* limited, and by him assigned to the bank, it is an undecided point upon which estate the security should be deducted. (See opposing dicta on the point by Lord Shand and Lord Deas in *British Linen Co., supra.*) On the one hand, the subjects of the security are part of the estate of A., and therefore the security should be deducted in ranking on his estate; on the other hand, A. has had the benefit of the advance for which the bank is ranked, and it would therefore appear more equitable that his estate should bear the full burden of the debt, and that the ranking on the estate of B. should be lightened by deducting the value of the security.

[Bell, *Com.* (M'L. ed.) i. 424; ii. 361, 416; Goudy, *Bankruptcy*, 2nd ed., 330, 533.]

Collateral Succession.—On the failure of the direct line of descent,—children, grandchildren, etc., of the deceased,—the succession opens next to the collaterals. The following statement of the lines of succession, in order of priority, shows the place which is taken by collaterals: *First*, the lineal descendants of the deceased. *Second*, brothers and sisters and their issue, collaterals of the deceased. *Third*, the deceased's father. *Fourth*, brothers and sisters of the deceased's father (the father's collaterals) and their issue. *Fifth*, the deceased's grandfather; and so forth *ad infinitum* (Stair, iii. 4. 3–7; Ersk. iii. 8. 5–9; Bell, *Prin.* 1657–68; M'Laren on *Wills*, i. 71 and 72). From this statement it will be seen that collaterals are either (1) the members of lines of legal descent flowing from the brothers and sisters of the deceased in their order of succession; or (2) the members of lines of legal descent flowing from brothers and sisters of an ascendant of the deceased in their order of succession (see Ersk. iii. 8. 89; Bell, *Prin.* 1665, 1650, note *a*; M'Laren on *Wills*, i. 71; *Ormiston*, 1862, 1 M. 10).

I. *Heritable Succession.*—The order of priority amongst collaterals of the same branch is as follows: The succession opens, *first*, to the brothers german in descending order and their issue, or, where the deceased is youngest brother, then to the immediate elder brother german and his issue. *Second*, failing brothers german, then to sisters german and their issue, equally amongst them as heirs-portioners. *Third*, failing brothers and sisters german, to the half-brothers consanguinean and their issue: if of a younger family, in descending order from eldest to youngest; if of an elder, in the inverse order, following the rule that heritage descends before ascending (*Johnson*, 1681, Mor. 14871; *Grant*, 1757, Mor. 14874). *Fourth*, failing half-brothers consanguinean, to half-sisters consanguinean equally amongst them as heirs portioners (Ersk. iii. 8. 89; Bell, *Prin.* 1661–65; M'Laren

on *Wills*, i. 75). The same order is followed amongst the collaterals of each ascending branch. An exception to this rule existed, as regards succession to *conquest* (see CONQUEST), until the abolition of the distinction between heritage and conquest by the Conveyancing Act of 1874 (37 & 38 Vict. c. 94, s. 37).

II. *Moveable Succession.*—Collaterals take the same place in order in moveable as in heritable succession, and in each collateral branch the relatives of the full blood and their descendants precede those of the half-blood consanguinean and their descendants (*Gemmil*, 1729, Mor. 14877). The following differences exist in the method of distribution: (1) The principle of distribution is that of equal division amongst all the next of kin, or relations nearest in degree to the deceased, and thus there is no primogeniture or preference of males; (2) there was no distinction between heritage and conquest (Ersk. iii. 92; Bell, *Prin.* 1860–61; 2 Bro. Supp. 618; (3) until 25th May 1855, there was no representation, as in heritage (M'Laren, i. 117–19). The Moveable Succession Act of that year (18 Vict. c. 23) introduces representation, sec. 1, in certain circumstances, with this proviso: "provided always that no representation shall be admitted among collaterals after brothers and sisters and their descendants." It has been held (*Ormiston*, 1862, 1 M. 10) that in this Statute "collaterals" is used in the wider sense; and that amongst collaterals more remote than brothers and sisters and their descendants, *e.g.* cousins german, there is no representation.

The following provisions of the same Act also affect the position of collaterals in succession. Sec. 3 provides that the surviving father takes one-half of the succession with the collaterals of the principal branch; sec. 4, that where the mother survives, predeceased by the father, she takes one-third with the collaterals; and sec. 5 admits brothers and sisters uterine to one-half the succession, failing brothers and sisters german and consanguinean.

See SUCCESSION: CONSANGUINEAN; UTERINE; CONQUEST.

Collatio bonorum.—Under the earlier Roman law, emancipated children had no right of succession to their father, either as *sui heredes* or as agnates; for their emancipation had, in the eye of the law, made them strangers to their father's family. The prætors corrected this injustice, and granted emancipated children the privilege of succession to their father, equally with their brothers and sisters who remained in the power of the paterfamilias at his death. It would, however, have been unfair to have allowed the emancipated children both to take their share of the family estate and to retain the property which they had acquired since their emancipation gave them proprietory capacity, while the unemancipated children were exclusively confined to their share of the family estate. The prætor remedied this injustice by requiring the emancipated children to make a *collatio bonorum*, *i.e.* to bring into hotchpot all property acquired by them in the interval between their emancipation and the death of their father (*Dig.* 37, 6. 1. 14). Property in the nature of *peculium castrense* and *quasi castrense*, which would not have passed to the father even though the child had not been emancipated at all, did not require to be collated (*Dig.* 37. 6. 1. 15).

Collation.—The common law, on feudal principle, adopts primogeniture and an undivided estate as the rule of succession in heritage, but

equal distribution among the next of kin as the rule of succession in moveables. Equity seeks to modify the hardships thence in many cases arising, by the doctrine of collation, whereby, where the heir in heritage is also one of the next of kin, the whole succession, heritable and moveable, may be thrown into one mass, and equally shared among the next of kin, including the heir. This is termed *Collatio inter hæredes.*

A similar equitable interference takes place in the adjustment and distribution of the legitim fund; but it occurs in two different sets of circumstances. The heir may claim to participate in the legitim, in which case he must collate. This is a branch of *Collatio inter hæredes,* and is treated as such. Or a child already substantially provided for may, notwithstanding, claim his share of legitim. A preference in favour of any individual child or children, by reason of advances made during the parent's life, is avoided by requiring such advances to be collated or brought *in computo,* if the child who has received them claims legitim, so as to equalise the division. This is termed *Collatio inter liberos.*

I. Collatio inter hæredes.

(1) It is a question difficult of determination, whether equity confers a privilege or imposes a restriction on the heir in heritage. Is the heir in heritage who happens also to be one of the next of kin excluded at common law from the moveable succession, and only permitted in equity to participate therein, on condition of sharing his heritage with the next of kin or younger children? Or is he entitled at common law to share with the other next of kin or younger children in the dead's part or legitim respectively, and is his right restricted in equity in their favour by the equitable condition that he must collate?

The institutional writers appear to have leaned to the view that the heir was *de jure* excluded from any participation in the moveable estate, and the early decisions seem to point in the same direction (Stair, iii. 8. 48; Ersk. iii. 9. 3; *Law,* 1553, Mor. 2365; *Kennedy,* 1622, Mor. 8163; *Murray,* 1678, Mor. 2372; *Trotter,* 1681, Mor. 2575). In the case of *Justice* (1737, Mor. 8166), however, the heir at law, being an only son, was held entitled to legitim against his father's testamentary disponees, the Court holding that the heir is no less entitled to a legitim than the other children, though, if he insist on it, he must collate; and declaring that the right to demand collation is a privilege personal and peculiar to the executor at law, and to no other. This decision is equivalent to saying, that where the heir "is the only child, he is just in the case as if he had collated." But if so, it is hardly possible to contend that he has no inherent right to legitim, but merely an equitable privilege.

Where the rest of the children have renounced their legitim, the heir, if he be not included in the renunciation, is free to claim the whole. It was so found in a question with stranger residuary legatees (*Panmure,* 1856, 18 D. 703). *Marten* (1749, Mor. 8167), where the contrary was found in a question with another child, is a doubtful decision.

(2) Prior to the passing of the Moveable Succession Act of 1855, an heir who was not at the same time one of the next of kin was not entitled to a share of the moveables, although he offered to collate the heritage. Thus aunts and uncles entirely excluded a nephew, son of their elder brother. By the 2nd section of that Act, however, the privilege of collation was extended not only to the eldest or only son, but also, in a modified form, to the younger children, and to the daughters, as heirs-portioners of a predeceasing heir (*Jamieson,* 1896, 33 S. L. R. 397).

(3) In addition to its being a privilege of the heir, collation is an "arbitrary" and "unilateral proceeding" on his part (*Kennedy*, 1843, 6 D. 40 (Ld. Fullerton); *Mitchell*, 1852, 14 D. 318). The personal representatives cannot compel him to collate; and any agreement for an equal division, containing conditions which the law does not prescribe, is not collation.

(4) An heir of provision, if he be also heir *alioqui successurus*, must collate if he claims a share of the executry (*Baillie*, 23 Feb. 1809, F. C.; *Fisher's Trs.*, 1844, 7 D. 129). The same principle is applicable to heirs of entail (*Little Gilmour*, 13 Dec. 1809, F. C.). In that case the heir of entail, being heir *alioqui successurus*, is called on to collate, not the value of the entire estate, but only of his own life-interest (*Anstruther*, 1836, 14 S. 272; *Breadalbane*, 1836, 2 S. & M'L. 377). On the other hand, where an heir of provision who is not heir *alioqui successurus* succeeds, he does not require to collate (*Duke of Buccleugh*, 1677, Mor. 2369; *Rae Crawford*, 1794, Mor. 2384) when claiming a share of the executry; but a younger son succeeding to his father as heir, in consequence of his elder brother dying in apparency, was found bound to collate (*Law*, 1553, Mor. 2363).

(5) The position of heirs-portioners in the matter of collation is peculiar (Ersk. iii. 9. 3), for in their case the law of primogeniture has no place, and the whole estate, heritable and moveable, is the common *portio legitima*, in which they are equally entitled to share (per Ld. Meadowbank in *Little Gilmour*, 13 Dec. 1809, F. C.). When, therefore, an estate was entailed on the eldest daughter and her heirs-male, it was found, in a question with the other heirs-portioners, that she could still claim an equal share of the moveables, without collation (*Riccarts*, 1770, Mor. 2378).

(6) When the heir succeeds by will to a share of the moveable estate, he cannot be called on to collate (*Brown*, 1686, Mor. 2375); for as this privilege is only necessary to enable him to assert his right as one of the next of kin, it cannot extend to rights from which the next of kin are excluded (*Sinclair*, 8 R. 749). On the other hand, where the heir is excluded by will from participation in the moveables, though on collation he may claim a share of legitim, he cannot demand a corresponding share of dead's part (Bell, *Com.*, 3rd ed., p. 96; *Clark*, 1835, 13 S. 326; *Johnston*, 1847, 9 D. 1387; *Panmure*, 1856, 18 D. 703).

(7) Collation is a doctrine peculiar to the law of Scotland, and therefore an heir in foreign heritage cannot claim moveable succession in Scotland unless he collate. But an heir in Scottish heritage, claiming under the English Statute of Distributions, may do so without collation (*Robertson*, 18 Feb. 1817, F. C.; *Hay Balfour*, 1793, 3 Pat. 300).

(8) The heir has an option as to the mode of carrying the collation into effect. The institutional writers describe collation as a communication of the heritable estate itself with the other next of kin; and after the case of *Murray* (1678, Mor. 2372), it cannot be doubted that the heir sufficiently discharges his obligation by making up a title to the heritable estate, and executing a conveyance of it in favour of himself, and the other personal representatives *pro indiviso* in proportion to their respective interests, and is not bound to settle on the footing of a money payment. On the other hand, in some cases a conveyance *pro indiviso* is impossible, *e.g.* in the case of entails, and the heir of entail sufficiently discharges his obligation by collating the value of his life-interest; and in the case of *Fisher* (1850, 13 D. 245), it was settled that the heir has the option of retaining the estate, and paying over its value in money to the executors as part of the fund for division, and that the executors cannot require a specific conveyance.

II. Collatio inter liberos.

It often happens that occasions arise which lead a father to make advances to one or more of his children, *e.g.* for the purpose of setting a son up in a profession or trade, or providing a marriage portion for a daughter. The law, however, which gives to children a right to an equal share of the legitim, views with disfavour any alienation by which such equality is disturbed, and requires any child who has received such an advance to attribute it to his share of legitim, under certain limitations. These limitations apply (1) to the class for the benefit of which the doctrine has been introduced; (2) to the nature of the advance.

(1) Collation only operates among those children *who have not discharged their right to legitim*, and it operates only *inter se*, and not in questions with third parties, such as the relict (Stair, iii. 8. 46).

Accordingly, neither is a child bound to collate advances so as to increase the relict's share, nor is the relict required to collate donations which she may have received from her husband during his life so as to increase the legitim of the children (*Ross*, 1627, Mor. 2366; *Balmain*, 1719, Mor. 2378; *Trevelyan*, 1873, 11 M. 516; *Keith*, 19 D. 1040). Nor are the children called on to collate with the executors (*Keith*, *supra*; *Clark*, 1835, 13 S. 326).

The converse was upheld in the case of *Fisher* (3 D. 1181). There a daughter who was claiming legitim was found not entitled to insist on her brother, the residuary legatee, collating any part of the residue, although he was founding on his undischarged claim for legitim for the purpose of reducing her share. And collation operates only among those children who are actually claiming legitim. In *Monteith* (1882, 9 R. 982) it was held that where children who have received advances from their father have elected to take the provisions given to them by their father's will, thus discharging their right to legitim, they cannot be called upon to collate these advances by the child who is claiming legitim for the purpose of increasing his share. In short, the "sphere of collation is confined to the adjustment of accounts between the children who are *claiming adversely to the will*" (M'Laren on Wills, 3rd ed., p. 325). There is no collation between children and grandchildren (Stair, iii. 8. 26).

(2) It may be said generally, that any advances made by a father out of his moveable estate, for the purpose of setting up a child in a profession or trade, or as a marriage portion, must be collated (Stair, iii. 8. 45; Ersk. iii. 9. 24; Bell, *Prin.* s. 1588).

Such advances, however, must (*a*) be from moveable estate; for it is only when the fund from which legitim is derived is diminished, that collation is necessary (Ersk. iii. 8. 46). Accordingly, a child, not being the heir, is not called on to collate heritage specially disponed (*Marshall*, 1829, 8 S. 110).

(*b*) The advance must be of such a nature that neither the father nor his executor can claim repayment. Loans or ordinary debts cannot be made the subject of collation: they must be paid into the general executry (*Webster*, 1859, 21 D. 915).

(*c*) The father's intention in making the advance must be considered. But whether a father intended a certain advance to be a *præcipuum* or not is often doubtful. Stair and Erskine (Stair, iii. 8. 26; Ersk. iii. 9. 25) are both at one, that collation operates, *unless it has been expressly provided to the contrary* by the father; and this view has been affirmed in several cases (*Skinner*, Mor. 1172; *Corsan*, Mor. 2367; *Bey*, Mor. 2379). Lord Fraser (*H. & W.*, 3rd ed., p. 1039), following the opinion of Vinnius, considers that

the prohibition need not be express, and that a father's intention can be inferred from facts and circumstances. In the case of provisions contained in *antenuptial marriage contracts*, not declared to be in satisfaction of legitim, the result of the authorities seems to be, that in a question with the father's trustees or executors there is no collation, but in a question with other children claiming legitim they must be collated (Stair, i. 5. 6; *Monteith*, 9 R. 982).

(*d*) Testamentary provisions, being chargeable against executry or dead's part, are not required to be collated, as they do not diminish the fund from which legitim is taken; and, generally, it may be said that "collation applies to *provisions* as *distinguished* from *payments under obediential obligations*, or which are made on the footing of contract" (Stair, iii. 8. 26; Ersk. iii. 9. 24; Bell, *Prin.* 1588; *Minto*, 1833, 11 S. 632; *Webster*, 1859, 21 D. 915).

College of Justice.—Prior to 1532, various attempts had been made to establish a Supreme Civil Court in Scotland, but the results had not been satisfactory. The Courts set up were found to be defective in constitution and limited in jurisdiction. By Act of Parliament passed in 1532 (erroneously cited by some authorities as 1537), King James v., in order to "establish a permanent Order of Justice," instituted "a college of fourteen persons with a president to sit and decide upon all actions civil." The Court thus instituted is said by Sir George Mackenzie to have been established upon the model of the Parliament of Paris. The Court, as such, is now known as the Court of Session, and the term College of Justice is the collective name given to those persons who are connected with the Court in the administration of justice (see SESSION, COURT OF).

Members.—The following are the members as declared by Statute or Act of Sederunt, namely, Judges or Senators (1540, c. 93), now reduced to thirteen (1 Will. IV. c. 69), Advocates, Clerks of Session, Clerks of the Bills, Writers to the Signet, the Depute Clerks of Session and their substitutes, one in each Clerk's office, the Depute Clerks of the Bills, the Director of Chancery, his depute and two clerks, the Writer to the Privy Seal and his depute, the Clerks of the General Register of Sasines and Hornings, the Macers, the Keeper of the Minute Book, the Keeper of the Rolls of the Inner and Outer House, the Keeper of Judicial Records of the Court of Session, the Assistants to the Principal Clerks of Session, and the Auditor of the Court of Session (A. of S. 23rd February 1687, 1 & 2 Geo. IV. c. 38, s. 32). By A. of S. 1687 (*l.c.*), which expressly declared who were members, the privileges thereby declared were extended to "one actual servant of each Lord of Session, one servant of each Advocate, four extractors in each of the Clerk's offices of the Session; two servants employed by the Clerk of Register in keeping the Public Register, the Keeper of the Session House, and the Keeper of the Advocates' Library. It is always hereby declared that if any of these servants and others to whom the foresaid privileges are extended shall keep merchant shops, taverns, or ale houses, or exercise any other trade within the burgh, they shall not enjoy any of the privileges above mentioned." Though these servants and others were thus declared entitled to the privileges mentioned in the Act of Sederunt, it may be questioned whether they were thus made or recognised as members of the College of Justice.

The Solicitors before the Supreme Courts have never been declared members by any Statute or Act of Sederunt, but they have been recognised

as such, and their right seems never to have been challenged (*Macintosh*, 1826, 4 S. 736; *Bruce*, 1833, 11 S. 313).

The holders of certain other offices now abolished used to be members (6 Anne, c. 26, s. 11; 59 Geo. III. c. 35, s. 36; and Acts cited *ut supra*).

Privileges.—Members of the College of Justice at one time enjoyed considerable privileges, the reason given being, "because the saidis personis mone awaite daylie upoun our said Sessioun except at feriat times" (Act 1532, c. 68). These privileges related to (*a*) *taxation*, (*b*) *actions*. (*a*) A general exemption from taxation was conferred by various Statutes (1532, c. 68; 1540, c. 93; 1597, c. 281; 1661, c. 23), but the privilege seems from an early period to have been confined to impositions levied by the town of Edinburgh. By a decree of the Court (embodied on account of its importance in the A. of S. 23rd February 1687, referred to above) in *The College of Justice* v. *Town of Edinburgh* (Mor. 2402), the members of the College were found exempt from payment (1) of the annuity levied for payment of the minister's stipend; (2) of watching and warding, and any impositions for the same; (3) of customs, causey mails, shore dues, and other impositions laid on goods carried to or from the city. They were also exempt from payment of poor rates (*Town of Edinburgh*, 1788, Mor. 2418; affd. 25th March 1790. See also Balfour, *Practicks*, 270; *Christian*, 1779, Mor. 2416). The privilege has now in all cases ceased, having been either expressly abolished (as by 8 & 9 Vict. c. 83, s. 50, with regard to poor assessments) or having fallen into desuetude. (*b*) Members had a right to sue and be sued exclusively in the Court of Session (A. of S. 19th February 1537, 1555, c. 39; 1587, c. 42; 1672, c. 16, s. 16; Balfour, *Practicks*, 270; Stair, iv. 1. 42). This involved a liability to be sued, as well as a right to sue, in the Court of Session in actions otherwise excluded from its jurisdiction (*Jamieson*, 21 Feb. 1815, F. C.; *Bruce*, 1833, 11 S. 313). The privilege had to be pleaded (*Laidlaw*, 9 June 1801, F. C., M. App. Arrest. No. 4). The privilege has been abolished by Statutes 1 & 2 Vict. c. 41, s. 35; 16 & 17 Vict. c. 80, s. 48; and 13 & 14 Vict. c. 36, s. 17. Members of the College of Justice are forbidden by Act 1594, c. 220, to purchase heritage while it is the subject of a depending lawsuit, and this has been construed to apply to all subjects of depending suits (Bell, *Prin.* s. 36). See BUYING OF PLEAS.

[See Shand, *Practice*, i. 39–133; Mackay, *Practice*, i. 84 *et seq.*; Stair, ii. 3. 3; Ersk. i. 3. 12.]

Colliers and Salters.—See ADSCRIPTI VEL ADSCRIPTI GLEBÆ.

Collision.—The leading object of this article is to state briefly and in the most general way the specialties of the law of reparation for negligence in the case of collision between ships. To a considerable extent ordinary rules apply, and these call for no special notice. Claims for loss of life in respect of collision may be made by the same persons, and no other, who can claim in the ordinary case. What constitutes negligence or contributory negligence may be ascertained by reference to common law principles. As the navigation of a ship at sea involves a high degree of care and skill and presence of mind, there is negligence if the collision is due to want of the care and skill of a competent seaman, applied with due presence of mind to the emergencies which arise at sea. On the other hand, in general, there is no responsibility if the casualty is due either to want

only of *extraordinary* care and skill, or to mistakes and errors of judgment induced by sudden peril, such as a man exercising care and skill, and having ordinary presence of mind, may commit in what has been called the agony of the collision (*Hisse Bros.*, 15 R. 498). The specialties in the law are due to the fact that ships are navigated on the high seas, and are subject to the law maritime, to Statute law, and perhaps, above all, to the regulations for preventing collision at sea, which in this country rest on Statute (Merchant Shipping Act, 1894), but are also International Regulations.

Inevitable Accident.—In the general case there is no liability if the collision is due to no fault on the part of either ship in the sense already explained (see *The Toward*, 13 R. 342; *The William Lindsay*, L. A. 5 P. C. 338; *The Merchant Prince* (1892), P. p. 179).

Inscrutable Fault.—The same result follows, though there must have been fault somewhere, if there is no sufficient evidence to show which ship is at fault (Marsden on *Collision*, 3rd ed., p. 2; but see Bell's *Com.*, i. (M'L. ed.), p. 626).

Both Ships at Fault.—If the collision is due to the fault of both ships, the whole damage is divided (*Hay*, 2 Sh. Scot. App. Ca. 395; *Boettcher*, 23 D. 322). In such a case the owner of cargo on board either ship can only recover one-half the loss from the other (*Hay, ut sup.*; *The Milan Lush*, 388; but see *The Bernina* (No. 2), 12 P. D. 58, per L. Esher, 83; *Chartered Mercantile Bank of India*, 10 Q. B. D. 521); but he has whatever claim the general law and his shipping contract gives him against the ship in which his goods are carried (*Chartered Mercantile Bank of India, ut supra*).

This special rule applies only to cases of collision between ships (*The Zeta* (1893), A. C. 468). It does not extend to the case of a ship coming in contact with something not a ship, or to those in charge of one ship doing injury to another without collision (*M'Knight*, 22 R. 607, H. L. 13 T. L. R. p. 53). The ordinary rules as to contributory negligence were applied where a ship stranded entering a port, and the harbour authorities were sued for the negligence of the harbour-master in the orders he gave the ship (*Renney*, 18 R. 294, H. L. 19 R. 11). But there is collision between ships when, *e.g.*, one ship comes into contact with the anchor of another, or with her towing rope when in tow of a tug (Marsden, 3rd ed., p. 137). A collision between two ships, due partly to the fault of one and partly to the fault of a third, is within the rule (*The Englishman* (1894), P. 239); but two ships in fault for collision with a third are each liable in the whole loss of the latter (*The Avon*, 1891, P. 7; *The Englishman, ut sup.*). It has no application to claims for loss of life due to collision (*The Bernina* (No. 2), 12 P. D. 58, 13 App. Ca. 1). This is the rule in England, and the same rule has been applied in the Sheriff Court in Scotland after litigation on the point (Boyd, *Sc. L. Review*, x. p. 302). There have been numerous cases in the Supreme Court without any suggestion being made that the Admiralty rule applies (*e.g. Carse*, 22 R. 475). In cases where the rule does not apply, the ordinary law as to contributory negligence takes its place (*e.g. Renney, ut supra*). In cases where it does, the mode of adjusting the claim is to deduct one-half of the damage least in amount from one-half of the larger damage, and to give decree for the balance. There is a single liability only, not counter claims —each falling to be sustained (*The Khedive*, 7 App. Ca. 795).

One Ship alone at Fault.—In this case that ship alone is liable.

We have spoken of the liability as that of the ship; but it is primarily that of those who are either themselves at fault, or are responsible for those who have been. In the case, *e.g.*, of a ship demised to charterers

who employ and pay the crew, the shipowner is not responsible personally for the fault of the crew in bringing about a collision (see *Baumwoll* (1893), A. C. 8.

Compulsory Pilotage.—A shipowner is not liable for loss by collision due to the fault of a pilot employed by him compulsorily, *i.e.* in obedience to statutory or other law (Merchant Shipping Act, 1894, s. 333). The pilot is not his servant. But if his ship is at fault, the shipowner has to show that the collision was primarily due to the fault of the pilot. He will satisfy this *onus* by proving that the proximate cause was an order of the pilot; but if the casualty were contributed to by defect in the ship, or want of care on the part of the crew, *e.g.* in the matter of look-out, or in failing to carry out the pilot's orders, then, however grave the fault of the pilot, the owner will have to answer for the casualty (*Clyde Navigation Co.*, 1 App. Ca. 790; see also *The Strathspey*, 18 R. 1048). In some cases, though there is an obligation to employ a pilot, the pilot is only an adviser, and the master remains in command. In such cases there is no room for the defence (*Guy Mannering*, 7 P. D. 52, 132).

If the collision is due to the fault of a pilot compulsorily employed by one ship, and also to the fault of those for whom the shipowners are responsible on board the other, the former ship recovers only one-half her damage (*The Hector*, 8 P. D. 218). The actual wrong-doer, *e.g.* the pilot, when the collision is due to his fault, is of course personally liable (*The Islay*, 20 R. 224).

Maritime Lien for Collision.—There is a maritime lien of the nature of a hypothec over a ship in collision for the loss due to fault on the part of those in charge,—other than a pilot compulsorily employed, or some other person for whom the shipowners or those in control of the ship have no responsibility. The lien may be discharged by laches in making it good, but it takes precedence of, *e.g.*, a purchaser without notice; a mortgagee or a prior bottomry bondholder (Marsden, pp. 82, 83 *et seq.*; *M'Knight, ut sup.*). This case decides that the law maritime of the United Kingdom is the same in the three countries.

There has been question whether the lien is good in cases where those in fault are not the servants, or, in the ordinary sense, the agents of the shipowner. It has been recently held there is no lien where the ship is a wreck, and the accident is due to insufficient lighting on the part of port authorities (*The Utopia* (1893), A. C. 491); but it has at least been suggested that there is a lien in a case where the ship is in possession of a charterer, to whom the ship is demised (*The Tasmania*, 13 P. D. 110). There is no lien if the ship has been wrongfully taken out of the owner's possession.

Limitation of Liability.—By Statute, liability in the case of collision is limited, where there is not personal fault on the part of the owner, to the amount of £8 per ton where there is loss only of ship or goods, and £15 per ton if this amount is needed to satisfy claims for loss of life or personal injury. But as the statutory limitations are not confined to cases of collision, this subject will be dealt with in its proper place (Merchant Shipping Act, 1894, s. 503).

The shipowner may agree to waive his right to limit his liability (*The Satanita* (1895), P. 248; H. L. Clarke, 13 T. L. R. p. 58).

Regulations for Preventing Collision at Sea.—In most cases the question of liability turns on the observance or non-observance of these regulations. The present statutory warrant for the Orders of Council by which the regulations are promulgated is the Merchant Shipping Act, 1894, s. 418,

and they are of statutory force. The regulations are truly international, having been adopted by all important maritime nations. They make provision for the lights to be carried by ships and vessels; the signals to be used in fog, etc., by ships in distress, and by which one ship may indicate her course to another; and the steering and sailing rules to be observed by ships approaching, meeting, or crossing each other so as to involve risk of collision. There are also special regulations for fishing-boats, etc. The regulations apply to all ordinary sea-going craft of whatever size, but they have been held not to apply to a small rowing-boat engaged in fishing in the Firth of Clyde (*Carse, ut sup.*: see also *Gas Float Whitton*, No. 2 (1895), P. 301, 12 T. L. R. 109). They apply to navigable rivers such as the Clyde (*Little*, 9 R. 118); but, as is expressly stated in the regulations (art. 25), they are subordinate to any special rule duly made by local authority relative to the navigation of any harbour, river, or inland navigation. The regulations, however, apply so far as not inconsistent with the special rules (*Little, ut supra*).

The limits of this article forbid a detailed examination of the different regulations. A breach of the regulations by a ship which has been in collision entails the very serious statutory consequence that she is thereupon deemed in fault for the collision without actual proof of negligence (Merchant Shipping Act, 1894, s. 419).

The exact meaning of this enactment has been the subject of serious controversy, but its true construction has now been in the main settled; and the following principles may be stated with regard to the way that Courts look at the regulation:—

(1) It is not necessary to show that the breach of regulation has brought about the collision in whole or in part. The Statute presumes this; but if it can be shown that the infringement could *by no possibility* have contributed to the collision, the ship will not be deemed in fault (*Fanny M. Carvill*, 13 App. Ca. 455, note; *D. of Buccleuch*, 15 P. D. 86; (1891) A. C. 310).

(2) It is provided that regard is to be had to dangers of navigation, and to any special circumstances which may render necessary departure from the special rules in order to avoid immediate danger (art. 23). Accordingly, a steamship has been held excused for non-compliance with perhaps the most important regulation affecting steamships approaching each other so as to involve risk of collision, viz. that they are to slacken speed, or stop and reverse if necessary (art. 18), *i.e.* if a seaman of ordinary skill and prudence should deem it necessary, with the knowledge he has at the time (*The Celt*, 14 App. Ca. 670; also *The Lancashire* (1894), A. C. 1), where the non-compliance afforded the best chance of averting or minimising the results of a collision, even though in fact the collision was neither averted nor minimised (*The Benares*, 9 P. D. 16).

The same principle applies to other regulations.

(3) As regards art. 18, at any rate, it will not excuse a breach of that regulation, that the master or officer in charge had reasonable ground for thinking that it was better not to slacken speed or stop and reverse, if, in point of fact, departure from the rule was not the best course to take. The regulations give no discretion on this point unless departure is necessary (*The Stoomcart*, 5 App. Ca. 876).

(4) In cases where the regulations have in fact been broken because, through the fault of the other ship, or from inevitable accident, the officer in charge has suddenly been placed in a position of peril, and in the agony of the moment has disregarded the regulations, the ship will not

be held in fault, provided the officer acted with ordinary care, skill, and presence of mind (*Hine Brothers, ut sup.*).

(5) Though a regulation in fact applies, a ship will not be held in fault for not conforming to it if those in charge could not reasonably know that it applied (*The Theodore H. Rand*, 12 App. Ca. 247).

Where one of two ships is under obligation to keep out of the way of the other, the latter has to keep her course (art. 17). The second ship will rarely be held in fault if, notwithstanding art. 23, she fails in sufficient time to take steps to avoid the collision by departing from her course, even though this may have been the right thing to do (*The Tasmania*, 15 App. Ca. 223; but see *The Memnon*, 4 T. L. R. 501). Where a ship saw another ship crossing her so as to involve risk of collision, and the second ship was under obligation to keep out of the way of the first, it was held no breach of the regulations that the first ship, when she saw the risk, contented herself with a second whistle of warning, there being then time for the other ship to keep out of the way, and only stopped and reversed in terms of art. 18 when she saw her signal still disregarded. Seamen are not called on to assume that another ship is being navigated with gross want of care unless this is clear (*Thomas Wilson, Sons, & Co.*, 1894, A. C. 116. See, however, *The Memnon, ut supra*).

It has been pointed out that it needs a high degree of necessity to warrant a ship, bound to keep her course (art. 17), departing from it, as by so doing she may frequently bring about collision (*The Highgate*, 62 L. T. (N. S.) 841).

(6) In certain cases there is a presumption of fault, *e.g.* against a ship overtaking another and coming into collision with her (*The Hilda*, 12 R. 76); or running down a ship at anchor in daylight, or at night, when it is proved the latter had her anchor-light duly burning (*The Indus*, 12 P. D. 46).

(7) However important the regulations, ships must be navigated in a seamanlike manner, and with all ordinary prudence, altogether apart from the regulations (art. 24). If not, and the failure to do so has, *according to general principles*, contributed to the collision, the ship will be deemed in fault.

The same result will follow the breach of local regulations with regard to particular waters; but unless, by Statute, it is otherwise provided, a breach of such regulations does not infer the statutory penalty.

Failure to Stand by.—If two ships are in collision, and one of them fails to stand by the other, so far as she can do so without danger to herself, the collision is, *in absence of proof to the contrary*, deemed to have been caused by the wrongful fault of the person in charge (Merchant Shipping Act, 1894, s. 422).

Tug and Tow.—In England there has been considerable litigation over the respective liabilities of tug and tow in cases of collision between ships, where one of them in collision has been either towing or being towed by another ship; and it is suggested that the law may be different according as the action is raised at common law or in Admiralty (see Marsden, 3rd ed., 185 *et seq.*). In Scotland it seems clear that there is only one rule, but the question what that rule is does not seem to have been formally considered and decided. In a recent insurance case it was assumed that the rules in Admiralty actions in England apply (*Baine & Johnson*, 17 R. 1016; affd. H. L. 1891, A. C. 401). It is submitted this is so, and these rules may be shortly stated. As was stated in the case just referred to, the tug and ship in tow are for some purposes treated as one ship. Where the tug is under

obligation to obey the orders of the tow, a collision between the tow and a third ship, due to the fault of the tug, has been held to involve the tow in liability (*The Sinquasi*, 5 P. D. 241); but in a more recent case, Ld. Hannen, while holding that it was the duty of the tow to exercise control over the tug to prevent her doing damage, seemed to be of opinion that if those on board the tow were absolutely free from blame, there might be no liability (*The Niobe*, 13 P. D. 55). The tow will also be held liable for collision between the tug and another ship if she is wholly or partly in fault therefor; but according to the view of L. Hannen in the case just referred to, she will not be so liable if she is wholly free from blame.

If the controlling voice in the navigation rests, not with the tow, but with the ship towing her, it seems clear that the tow is not liable for a collision unless it is due to fault of her own (*The American* and *The Syria*, L. R. 6 P. C. 127; *The Quickstep*, 15 P. D. 196).

Collision of Ships with Harbours, or other Objects not Ships.—In these cases, apart from Statute, the rules of the common law apply.

By the Harbours, Docks, and Piers Act, 1847, s. 74, the owner of a ship which damages the harbour or works under charge of the commissioners acting under an Act incorporating the general Act, is answerable for the damage. The meaning of the Act has been the subject of most serious difference of opinion. In the case of *The River Wear Comrs.* (2 App. Ca. 743), it was held by the House of Lords that the owner was not liable for injury to a pier done by his ship due to the act of God; but, as was pointed out in a very recent case in the same House, the reasons for this judgment were of the most varying character (per Ld. Herschell, *The Ship Crystal*, 1894, App. Ca. 508), and the judgment may possibly still be reconsidered. The latter case settles that the owner is he who is owner at the time expense is incurred, and not the owner at the time of the casualty. But see *Howard Smith & Son*, 1896, A. C. p. 579.

Damages.—Damages are ascertained according to the ordinary rules. It has been held that the pursuer is entitled to recover the cost of repairing damage, without any deduction in respect new materials are substituted for old. Difficult questions arise, in cases of collision, how far the loss has been due to the fault of the wrong-doer; or has been aggravated by want of care on the part of those in charge of the injured ship. So also with regard to whether certain damage is too remote to be recovered. But as these questions fall to be determined by the ordinary rules in actions of reparation, they are not fully considered here. It may be mentioned that in England it has not been the practice to give damages for loss of market to cargo on board a ship injured by collision (*The Notting Hill*, 9 P. D. 105. See, as to average contribution, *The Marpessa*, 1891, P. 403). Damages are given for loss of profit on a charter annulled through delay due to collision (*The Star of India*, 1 P. 466); also in respect of loss of earnings of a fishing-boat (*The Resolute*, L. R. 8 P. D. 109). In the ordinary case, when a dredger belonging to a public harbour Board is damaged, the Board are not allowed a sum by way of demurrage for loss of the use of the dredger (*The Emerald* (1896), P. 192).

Costs.—In the case of actions for collision where both ships are held in fault, the usual rule is to give no costs to either party: but this rule is affected by an admission, or tender of admission of fault or part fault, on the part of either ship. In other cases costs follow the event.

Nautical Assessors.—In cases of collision, the Courts may have the aid of nautical assessors (Nautical Assessors (Scotland) Act, 1894).

Insurance.—The underwriters on an ordinary policy are liable for injury

by collision to the ship insured, though due to the fault of those in charge of her; but there is no claim against them in respect of claims by another ship against the ship insured. The practice is now universal to make provision for this case by a clause which is known as the running-down clause, whereby, according to an ordinary form, the underwriters agree that if the ship insured comes into collision with any other ship, and the assured shall in consequence become liable to pay any sum not exceeding a limit stated in the clause, the underwriters will pay such proportion of three-fourths of the sum paid as their subscriptions bear to the insured value of the ship. Provision is also made as to costs, and claims for loss of life or personal injury are excluded. In a Scottish case it was held that life claims were covered by the clause unless excluded (*Coey*, 22 D. 955); but the contrary has been held in England (*Tayla*, 5 B. & S. 58), and it is thought the case of *Coey* would be held overruled. It has been held that this clause makes the underwriters responsible for their proportion of the loss due to collision between the tug of a ship insured and a third ship for which the owners of the ship insured were responsible (*Baine & Johnson, ut supra*).

It is the practice of the shipowner to cover himself in respect of collision, so far as the ordinary policy with running-down clause does not protect him, by entering the ship with a Protection Club.

See LIMITATION OF LIABILITY; REPARATION; NEGLIGENCE; CONTRIBUTORY NEGLIGENCE.

Marsden on *Collisions at Sea.—Note.*—Scotch cases have been quoted wherever applicable, rather than English; but of course the cases in England have been much more numerous, and should always be referred to.

Collusion is a defence to an action of divorce, and a ground of reduction of the decree. It is a term not very easy to define. Its denotation is simpler than its connotation. It may perhaps be said to be any fraudulent agreement between the parties to divorce proceedings for any of the following purposes:—1. That one of them shall commit a matrimonial offence in order that the other may be able to obtain a divorce (*Todd*, 1866, L. R. 1 P. & D. 121; Fraser, *H. & W.* ii. 1194). 2. That a false case shall be presented, or pertinent and material facts, whether sufficient to establish a defence or not, withheld from the Court (see *H.* v. *C.*, 1860, 1 S. & T. 617; *Butler*, 1890, 15 P. D. 74; *Barnes*, 1867, L. R. 1 P. & D. 505; *Rogers* [1894], P. 161; *Bonaparte* [1892], P. 402). 3. That the action shall be conducted in a certain way, and subject to certain stipulations, and shall be undefended (Fraser, *H. & W.* ii. 1195; *Churchward* [1895], P. 7; see *Shaw*, 1868, L. R. 3 H. of L. Ca. 55; *Chisim's* case, Macqueen's *House of Lords Practice*, 582; and *Edward's* case, *ib.*, 583. But see *Graham*, 1881, 9 R. 327. And the Court might take the view that there was collusion even where there was no express agreement that there should be no defence, if it appeared that the action was being prosecuted in concert. For any agreement as to the conduct of divorce proceedings is calculated to arouse the suspicion of the Court that there may be an attempt to prevent a full and fair disclosure of the whole circumstances which have led to the bringing of the action (see *Churchward, ut supra*).

In *Graham*, 1881, 9 R. 334, Ld. Young doubts if it would be collusion for a husband who believed himself entitled to a divorce, to promise his wife a provision on condition that she abstained from putting forward a false defence. Although the Court might take a lenient view of

such an agreement when completely satisfied that it was made with honest intentions, it is humbly thought that any such paction is *primâ facie* very objectionable, and in direct conflict with the Oath of Calumny (*q.v.*) (see *Churchward*, *ut supra*).

Where the parties concur in getting up evidence in support of the case, the Court may hold collusion established, although it is not shown that the evidence is false (*Midgeley*, 1861, 30 L. J. P. & M. 59; *Lloyd*, 1861, 30 L. J. P. & M. 97; see *Churchward*, *ut supra*). But the fact of the wife, the defender, receiving money from the pursuer's solicitor to attend at the trial for identification, was held not to be collusion (*Harris*, 1862, 31 L. J. Mat. Ca. 160).

The essence of collusion is concert, and therefore it would not be collusion for one of the spouses to commit adultery in the hope that the other might bring a divorce, but with no agreement to that effect (*Walker*, 1844, 17 Scot. Jur. 87; Fraser, *H. & W.* ii. 1194). It is grave misconduct on the part of a law agent to assist the parties in concealing from the Court the true facts of the case (see *S.S.C. Society* v. *Officer*, 1893, 20 R. 1106).

Who may take the Plea?—It is only in a very curious state of circumstances—such as a change of mind at the last moment before the trial—that the plea would be likely to be stated by the principal defender. But it would appear to be competent (see Lothian, *Consistorial Law*, 155; Mackay, *Manual*, 483). It might no doubt be taken by any subsidiary defender, including a co-defender, or by creditors whose rights would be prejudiced (see Ersk. i. 6. 45). And now, by sec. 8 of the Conjugal Rights Act, 1861 (19 & 20 Vict. c. 96), the plea might be taken by the Lord Advocate.

It was formerly said that it would be incompetent to state such a plea after the oath of calumny had been administered, or to reduce a divorce on the ground of collusion (Ersk. i. 6. 45; see *Greenhill*, 1822, 1 S. 296; affd. 2 Sh. App. 435; *St. Aubyn*, 1814, in Fergusson, *Divorce Cases*, 276; *Humphray*, *ib.* 365; *Utterton*, *ib.* 23; Mackay, *Manual*, 483). But it is thought this rule would not now be followed, inasmuch as it seems to lose sight of the consideration that divorce is not entirely *privati juris* (Fraser, *H. & W.* ii. 1196). A defender who has allowed decree of divorce to be pronounced in absence, may afterwards come forward and ask a reduction on the ground that the decree was obtained by collusion (*Stewart*, 1863, 1 M. 449; *Graham*, 1881, 9 R. 327). It is not so clear that the pursuer in the divorce could afterwards claim that it had been procured by his own fraud (see per Ld. Young in *Graham*, *ut supra*. But see *Bonaparte* [1892], P. 402).

It is a striking fact that there appears to be no reported case in Scotland in which the plea of collusion has been sustained (Fergusson, *Divorce Cases*, 363; Fraser, ii. 1194). This, it is to be feared, is due not to the infrequency of the offence, but to the facility with which it may be concealed. In England such cases as are brought to light would in general pass undetected were it not for the careful inquiries made on behalf of the Queen's Proctor, acting under 23 & 24 Vict. c. 144, s. 7. It is to be regretted that the provision of the Conjugal Rights Act, 1861, s. 7, giving to the Lord Advocate analogous powers, has in practice been almost a dead letter. In only one or two cases has there been any intervention by the Lord Advocate (*Ralston*, 1881, 8 R. 371). Although, for this reason, the cases are almost all English, the doctrine that collusion is a bar to divorce is not doubtful (*Graham*, *ut supra*).

Foreign Divorce obtained by Collusion will not be recognised.—If it is shown that a foreign Court was misled by the parties into the belief that it had jurisdiction, a decree of divorce so fraudulently procured will not stand

if it be afterwards challenged in the Court of the parties' true domicile (*Shaw*, 1868, L. R. 3 E. & I. App. 55, see per L. Westbury, 82; *Dolphin*, 1859, 7 H. of L. Ca. 390, per L. Kingsdown, 422; *Harvey*, 1882, 8 App. Ca. 43; *Bonaparte* [1892], P. 402. See DIVORCE; CALUMNY, OATH OF.

[See Fraser, *H. & W.* ii. 1194; Lothian, *Consistorial Law*, 155; Mackay, *Manual*, 483; Bishop, *Marriage and Divorce*, ii. s. 249; Walton, *H. & W.* 53, 441.]

Combination.—See TRADE UNION; STRIKE.

Comity, comitas.—Courtesy, friendly intercourse, politeness, generosity, goodwill: Private International Law (Phillimore, vol. iv.).—Story (*Conflict of Laws*, s. 38) says of the phrase "comity of nations": "It is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another." In sec. 33, he discusses and answers objections to the use of the term "comity." This doctrine is expressly adopted by Wheaton (Boyd's 3rd ed., s. 79), by Fœlix (*Demangeat*, i. 22, ii. 49), and by Phillimore (*ut supra*). It had been previously laid down by Huber (Guthrie's *Savigny*, 2nd ed., p. 509; Story, s. 29) in his third axiom; and this particular use of the term may be traced through him to Proculus, who, in *Dig.* 49. 15. 7. 1, uses the phrase "populi majestatem *comiter* conservare." It appears from Cicero, *pro Balbo* (16, 35), and other classical texts, that this was a formula in treaties of peace, where the word "comiter" seems to suggest a liberal, as opposed to a strict, interpretation (cf. Lewis and Short, *Latin Dict. s.v.* "Comiter").

Erskine (*Inst.* iii. 2. 39) declares that "this *comitas* is founded not only in the highest policy . . . . but in the essential rules of equity" (cf. iv. 3. 4, where *ex comitate* is contrasted with *ex necessitate*).

The doctrine of comity was adversely criticised by M'Queen, L. J. C., in *Watson* (1791), Bell's 8vo Cases, at p. 106; by Lord Brougham, in *Yates*, 3 Cl. & Fin. 544, at p. 586, and in *Warrender*, 2 Cl. & Fin. 529; and by the Court of Queen's Bench in *Schibsby*, L. R. 6 Q. B. at p. 159. But the maxims of Huber and statement of Story above quoted are referred to without express disapproval by Lord Wensleydale in *Fenton*, 3 Macq. at p. 548.

Notwithstanding the authority of Phillimore, it may be said that the doctrine is now universally rejected on the continent of Europe, in America, and in this country. It was repudiated by the Institute of International Law in 1874 (*Annuaire de l'Institut*, i. 123; *Revue de droit international*, vii. 362). The fallacies of Story's argument are exposed by recent editors of the *Conflict of Laws* (Redfield, 6th, Bennett, 7th, ed., s. 38*a*; Bigelow, 8th ed., p. 36, a long and valuable note). Cf. Kent, *Com.* (13th ed.) ii. 120, 405, 458. See also Wharton, *Conflict of Laws*, s. 1*a*, where the continental authorities are referred to; Lawrence, *Comm. sur Wheaton*, iii. 58; Guthrie's *Savigny* (2nd ed.), 70, note, p. 75; Bar (Gillespie, 2nd ed.), pp. 2, 942. "If now and again the word 'comitas' is still used for the considerations on which the application of foreign rules of law ought to depend, that is rather a difference of expression than of real meaning" (*ib.* p. 77). Cf. Lorimer, *Law of Nations*, i. 358. It seems now to be evident, as Prof. Dicey points out (*Conflict of Laws*, p. 10), that the disputes in question "are little better than examples of idle logomachy."

Commissary Court.—Prior to the Reformation the Scottish bishops were in the habit of delegating much of the extensive jurisdiction which they exercised within their dioceses, to certain "officials" or "commissaries." After the Act passed by the Convention of Estates on 24th August 1560, which abolished the authority of the Pope and all popish jurisdictions within the realm, the functions of the Ecclesiastical Courts passed to the Court of Session, which continued for the next three years to be the tribunal for all cases formerly competent to the Ecclesiastical Courts. In 1563, however, the Commissary Courts were established, and the old ecclesiastical jurisdictions thus again restored. Their name was derived from that of the officials to whom the bishops had been wont to delegate or "commit" their judicial functions, and who were called the Bishop's Commissaries. In addition to naming a Commissary for every diocese, Queen Mary established a new Commissary Court at Edinburgh, consisting of four judges or commissaries; and on the same day (5th March 1563) she issued the Charter of Constitution of the Commissariat, by which the new judges were authorised to determine all causes formerly competent in the Roman Catholic Courts. Upon their re-establishment, in the reign of James VI., the bishops were given the right of naming their several commissaries. After the Revolution, however, the nomination of the commissary judges devolved on the Crown.

The principal Commissary Court—that of Edinburgh—was vested with a double jurisdiction: one diocesan or local, and the other universal or general. Its local jurisdiction was coterminous with that of the former bishopric of Edinburgh, and comprehended the counties of Edinburgh, Haddington, Linlithgow, Peebles, and part of Stirlingshire. Its general jurisdiction extended over the whole of Scotland, and the islands thereto belonging. In causes which were strictly of a consistorial nature, the jurisdiction of the Commissaries of Edinburgh excluded that of the Civil Courts, in the first instance, and that of the inferior commissaries. As the local judges in their own commissariat, they exercised a privative jurisdiction in the confirmation of testaments, in competitions for the office of executor, and in the registration of inventories and settlements; and also a concurrent jurisdiction with other Judges-Ordinary in actions of scandal, etc. An appeal lay from the decrees of the inferior Commissary Courts to the Commissary Court of Edinburgh within a year from the date of the decree.

The inferior commissaries were originally fourteen in number, being one for each of the Scottish dioceses, but their number was augmented from time to time until it eventually reached twenty-three. The jurisdiction of the inferior courts included some of the less important consistorial actions, and was in other respects commensurate with that exercised by the commissaries of Edinburgh as the local judges in their own commissariat. But their chief duty consisted in receiving and recording inventories and settlements, and granting confirmation in the cases of persons who died domiciled within their respective commissariats.

By the Act 4 Geo. IV. c. 97 (1823), the Commissary Courts were subjected to extensive changes. All the inferior commissariats were swept away; the Commissariat of Edinburgh was restricted to the three Lothians, and each of the other counties in Scotland was erected into a commissariat, with the Sheriff as commissary, and with a commissary clerk, whose office was distinct from that of the Sheriff Clerk. The appellate jurisdiction of the Commissaries of Edinburgh was abolished, and the sole right of revision vested in the Court of Session.

By the Act 1 Will. IV. c. 69 (1830), the counties of Haddington and Linlithgow were detached from Edinburgh and erected into separate commissariats, on the same footing as the other counties; and by the Act 6 & 7 Will. IV. c. 41 (1836), the old Commissary Court of Edinburgh itself was abolished, and its whole remaining powers and jurisdictions transferred to the Sheriff of the county of Edinburgh, as the commissary thereof. By these various Statutes, and by the Act 13 & 14 Vict. c. 36 (1850), the extensive jurisdiction of the Commissary Courts was practically restricted to confirmation of executors, and matters incidental thereto, namely, questions as to the formal execution of wills containing a nomination of executors, and the meaning and effect of such nominations; the appointment of executors-dative, and the amount of caution to be found by them; the appointment of factors for minor and pupil executors *quoad* executry funds, the regulation of inventories and settlements, competitions for the office of executor, etc.

By the Sheriff Courts (Scotland) Act, 1876 (39 & 40 Vict. c. 70), the Commissary Courts in Scotland were completely abolished, and their powers and jurisdiction transferred to the Sheriffs, then holding the office of commissaries, and to their successors in office, as Sheriffs, who should thereafter possess and exercise the whole of the said powers and jurisdictions. Power was also granted to the Court of Session to regulate the procedure and the fees of the Court, to determine the place or places at which the business transferred to the Sheriff Courts should be conducted, and to declare where the records should thereafter be kept (see A. S. 15 Jan. 1890). Under the provisions of this Statute (1876), the office of commissary clerk, with its whole powers and duties, is already in most counties merged in that of the Sheriff Clerk, and will ultimately be so in all except Edinburgh, where the office will continue to be maintained distinct from that of the Sheriff Clerk, and to be regulated by the Act 4 Geo. IV. c. 97. Where the office of commissary clerk continues to subsist, he is authorised to perform in the Sheriff Court of the county all the duties, and exercise all the powers, formerly competent to him in the Commissary Court; and all commissary business must be conducted through his office, and not through that of the Sheriff Clerk. The Statute, however, provides that a commissary clerk shall not, by acting as clerk in a Sheriff Court, be disabled from acting as a procurator therein, except in commissary causes. By the Sheriff Court Act of 1876 it is provided that "every action in the ordinary Sheriff Court shall be commenced by a petition in one of the forms, as nearly as may be, contained in Schedule A" annexed to the Act. In applications for decerniture as executor of a deceased person, it is essential that the place and date of death and the domicile of the deceased should be stated. It is further required that the petitioner shall state what relationship, character, or title he has, giving him right to apply for the appointment of executor (see 21 & 22 Vict. c. 56, 1858). On the expiry of nine days after the commissary clerk has certified the intimation and publication of the petition, the petition is enrolled by the clerk and called in Court, when attendance must be given by the petitioner or his agent to move for decree. Where there is a competition, the competing applications are considered by the Sheriff, who, where the question is simply one of law, may at once conjoin the petitions, and decide the case or appoint it to be debated. Where, however, matters of fact are in dispute, the practice is to allow a record to be made up in one of the petitions, after which the case proceeds as an ordinary Sheriff Court action, the other petition being continued until the question in dispute has been decided, when both petitions are disposed of together.—[Currie

on *Executors*, 2nd ed., c. 12.] See CONFIRMATION; MOVEABLE SUCCESSION (SHERIFF COURT).

Commission.—See MANDATE; AGENCY; BROCAGE; BROKER; FACTOR; DEL CREDERE.

Commission in the Army.—All regulations authorising the purchase, sale, or exchange of commissions in Her Majesty's army were cancelled by Royal Warrant, dated 20th July 1871. The Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86), was passed to regulate the compensation to be paid to officers holding saleable commissions, on retirement. The Regimental Exchange Act, 1875 (38 Vict. c. 16), authorises Her Majesty to regulate from time to time exchanges to be made by officers of the regular forces from one regiment or corps to another, and excepts exchanges so made from the provisions of the Army Brokerage Acts (5 & 6 Edward VI. c. 16; 49 Geo. III. c. 126). Commissions are now obtained by open competition through the Royal Military Academy, the Royal Military College, or through the Universities; by competition from the Militia, as Queen's Cadets, or through the Colonies by a qualifying examination, or through the ranks (see *The Army Book for the British Empire*, 314, 416). An officer, though appointed to a particular corps or regiment, is liable to serve with any portion of the army if so ordered. An officer is not entitled to resign his commission whenever he pleases, but his resignation must be accepted before it becomes effectual (*Manual of Military Law*, War Office, 1894, p. 271, and cases there cited). Officers cannot obtain redress in the Civil Courts for injuries which affect only their military status or character. Thus no remedy will be given by the Civil Courts to an officer for dismissal, deprivation of rank, or reduction or deprivation of military pay (*ib.* 176, and cases there cited).

A member of the House of Commons who accepts for the first time a commission in the Army or Navy, must resign his seat, but may be re-elected (6 Anne, c. 41, s. 25). The acceptance of a new commission by a member who is already in the Army or Navy does not vacate his seat (6 Anne, c. 41, s. 27). This exception has been extended to the acceptance of a commission in the Marines (2 Hatsell, 62, n.). A member who accepts a first commission in the Militia, Yeomanry, or Volunteers, does not vacate his seat (52 Geo. III. c. 68, s. 176; 44 Geo. III. c. 54, s. 58; 26 & 27 Vict. c. 65, s. 5; 36 & 37 Vict. c. 77, s. 6).—[See May, *Parliamentary Practice*, 10th ed., 611; Rogers on *Elections*, Part II., 16th ed., 16, 63, 68; *Manual of Military Law*, War Office, 1894.] See ARMY.

Commission, Proof by.—Observe that it is no longer necessary to obtain extract of the interlocutor granting the commission in order to put it into execution, for Statute has made a certified copy of the interlocutor equivalent thereto (13 & 14 Vict. c. 36, s. 25). Clerks of Court are directed to insert in any interlocutor granting a commission to be executed outwith Scotland, a statement that such commission is to be sealed with the seal of Court being before issued (Memorandum to Clerks, 20 July 1886).

1. *Conduct of the Commission.*—The following recommendations to commissioners, made by A. S. 11 Mar. 1800 (made perpetual by A. S.

22 June, 1809) are applicable to the examination of witnesses and havers alike:—"To allow no matter to be introduced which is not pertinent to the cause, nor any unnecessary pleading or altercation about the competency of questions or the admissibility of witnesses, and to check the parties if they attempt to load the proceedings with unnecessary evidence or superfluous matter of any kind: to attend to the rules of evidence, and to give their own deliverances either *viva voce* or in writing: it being always understood that their whole proceedings shall be subject to the after consideration of the Court, upon application by either party; in order to which the commissioner himself, or those acting for the parties, may take such notes on a separate paper as they think proper for the due information of the Court: but nothing shall enter the report but what the commissioner himself may think material" (s. 4).

"That, when proofs are allowed by any of the Lords Ordinary to be reported to himself, especially in matters of smaller moment, or where despatch is necessary, his Lordship may, according to circumstances, order the commission or other warrant to be issued either to the commissioners of the above description, or to any Sheriff, or Sheriff-Depute, or Substitute, or any other inferior magistrate, or the clerk or the assistant clerk of any Court, but in no case shall allow the parties or their agents to have their own commissioners; and the same regulation may be observed even in the case of proof to be reported to the whole Court; providing always that this last shall only be done upon application to the Court, and special cause shown, such as the necessity of immediate despatch, or that the commission is granted merely for the examination of a party, or the exhibition of writings, or to expedite matters in a judicial sale, or that a proof is to be taken in a very distant part of the country, where none of the regular commissioners can attend" (s. 5).

"That, in case it shall be necessary to examine witnesses furth of Scotland, the commission shall be granted to some person duly qualified, and with and under such regulations and restrictions as the Lord Ordinary or the Court shall think best adapted to the circumstances of the case and to the practice hitherto observed" (s. 6).

"That, in the course of taking the depositions, if it shall appear to the commissioner that any witness is not disposed to tell the truth, or behaves in any unusual manner, to take a note thereof at the time, by way of assistance to his memory, in case he should be appealed to on that subject by either of the parties when the proof comes to be advised; or, if he thinks proper, he may annex the same to his report of the proof" (s. 7). See also the provisions of the A. S. 16 Feb. 1841, noted below (3).

The record of the commission is called the report. A form is appended at the end of this article. It should narrate the production to the commissioner of the certified copy of the interlocutor appointing him, his acceptance of the commission, his nomination of a clerk, and administration to him of the oath *de fideli administratione*. (See on this last point, *Cuming*, 1707, M. 4433; *Robertson*, 1841, 4 D. 159.) The compearance of the parties' agents, who are named, is noted. It must be recorded that each witness or haver was sworn (*A. B.*, 1838, 16 S. 630); and in practice, each deposition concludes with the words (which, however, are not essential) "all which is truth, as the deponent shall answer to God." Where the deposition is made on affirmation, the report must be worded accordingly.

The depositions are dictated by the commissioner to the clerk in narrative form. But where it is important to have the *ipsissima verba* of

the deponent, the evidence should be dictated and taken down in the form of question and answer.

Objections stated, answers thereto, and the commissioner's deliverances thereon, should be shortly noted; and, where a question is of doubtful competency, it, together with the answer, should be taken on a paper apart, and sealed up, to await the decision of the Court on appeal. A like course should be followed where an appeal is taken against the commissioner's ruling admitting a document.

After the deposition of the witness or haver has been read over to him by the commissioner, it must be signed by him and by the commissioner, and should be signed by the commissioner's clerk. If the witness cannot write, the fact and the cause should be recorded. The same three persons sign each page of the report, all marginal additions thereto, and all envelopes containing depositions taken upon separate papers, and docqueted as relative to the report. The number of words deleted, if any, should be mentioned at the conclusion of the deposition. The documents referred to by a haver are identified in the deposition by short description and date, and are marked and signed by the haver, commissioner, and clerk, as relative thereto. If numerous, they are initialed by the same persons as produced conform to an inventory, signed as above.

Where excerpts only are to be taken at the sight of a commissioner, the usual practice is for the haver or the commissioner's clerk to make them, and for the commissioner to compare them with the documents from which they are taken.

A shorthand writer may be employed in Sheriff Court commissions where evidence is taken to lie *in retentis* (37 & 38 Vict. c. 64, s. 4).

[See Mackay, *Manual*, 241–9; Dickson on *Evidence*, ss. 1375–6, 1393, and App. I. See also *Lockyer*, 1846, 8 D. 582; *Inch*, 1856, 18 D. 997. As to procedure in the Sheriff Court, see Dove Wilson, *Sheriff-Court Practice*, 4th ed., 156.]

2. *Commission and Diligence to recover Writings.*—In order to recover writings in the hands of the opposite party, or of third parties, called "havers," a motion for commission and diligence may be made before or after the record is closed. Due intimation of the intended application must be made to the opposite party: and the specification—*i.e.* a list identifying by date and description the documents sought to be recovered—must be lodged in process, and a copy thereof sent to him and to the judge's clerk. Before such diligence can be obtained, however, there must be an action in dependence. The power to grant commission and diligence extends to all cases (Mackay, *Manual*, 241–2): and motions therefor form part of the vacation business of the Lord Ordinary on the Bills (Court of Session Act, 1868, s. 93). A Lord Ordinary's interlocutor granting such diligence can be reclaimed against only with his leave (*Stewart*, 1890, 17 R. 755). Where the case is before arbiters, their approval of the specification is a condition precedent to an application to the Court (see Ersk. iv. 3. 31; Dickson, ss. 1704–5, WITNESS) for warrant to cite witnesses and havers (*Crichton*, 1888, 15 R. 784). It has been decided that the Sheriff Court has power to enforce the orders of the Courts of the Established Church for the attendance of witnesses or production of documents (*Presbytery of Lews*, 1874, 1 R. 888; see that case as to the position of Dissenting Churches). It follows *a fortiori* that the Court of Session has such power (Mackay, *Manual*, 115).

As a general rule, the motion is made after the record has been closed

and proof ordered. But it may be granted during the course of a proof, or in the Inner House, or pending an appeal to the House of Lords, or, as noted below, on cause shown before the record is closed (Mackay, *Manual*, 241; *Baroness Gray*, 1874, 1 R. 1138; *Liquidator of the Universal Stock Exchange Co.*, 1891, 19 R. 128; *Forbes*, 1857, 20 D. 287).

The commission is granted to an advocate or law agent (see *Macleod*, 1856, 18 D. 778). A person skilled in Scots law, or, if such person is not available, a lawyer or public officer, will be appointed when the commission is to be executed abroad (Mackay, *Manual*, 241; see also A. S. 11 Mar. 1800, s. 6, quoted above). The Lord Ordinary may himself take the depositions: but the practice is unusual and discountenanced (*Baroness Gray, supra*).

When the diligence is granted, any person may be cited under it who may be reasonably supposed to have the documents in his possession (Mackay, *Manual*, 242). A *minor pubes* may (*E. of Marr*, 1628, M. 8918), a pupil cannot (*Aitken*, 1628, M. 8907), be examined as a haver. His tutors, if he any have, should be called (see Fraser, *P. & C.* 161–2; Shand, *Practice*, 374, as to the competency of appointing *ad hoc* a tutor *ad litem* to a pupil who has no tutors). A husband may be examined for his wife, and an agent or clerk for a landed proprietor, partnership, or company, if there is no ground to suspect unwillingness or concealment on the part of the principal (Mackay, *Manual*, 242). Further, a peer must attend and depone, if cited (Dickson, s. 1385).

When a haver disobeys the citation, application may be made for letters of second diligence, under which, while he cannot be imprisoned (*National Exchange Co.*, 1858, 20 D. 837, 840, *per* Ld. Deas), he may be apprehended and brought before the commissioner for examination (1672, c. 16, s. 25; *Juridical Styles*, 3rd ed., iii. 390–2). If he obey the citation, but does not produce the document, letters of second diligence will not be granted (*National Exchange Co., ut supra*). But if, on application to the Court, he be ordained to produce, and still refuse, he may be imprisoned for contempt (Shand, *Practice*, 373).

A party who has obtained a commission and diligence in Scotland may compel the attendance of havers in any part of the United Kingdom within which the diligence may require to be executed (6 & 7 Vict. c. 82, ss. 5, 6; 17 & 18 Vict. c. 34, ss. 1–5; see *Blaikies Brothers*, 1851, 13 D. 1307: *Highland Railway Co.*, 1868, 6 M. 896, where the case was before arbiters). Similar provision is made for the case of a person in Scotland required to produce documents under a commission granted by a Court in England, Ireland, or other part of the British dominions (22 Vict. c. 20), and by a foreign Court (19 & 20 Vict. c. 113). A certified copy of an interlocutor of proof pronounced by a Sheriff is sufficient warrant for the citation of havers residing outwith the sheriffdom, if endorsed by the Sheriff Clerk of the county where the haver resides (16 & 17 Vict. c. 80, s. 11). See also below (5).

The interlocutor granting the commission and diligence either fixes the date of report or orders it to be reported *quam primum* (Mackay, *Manual*, 243). The time fixed for reporting cannot be prorogated, nor the diligence renewed, except on payment of such previous expenses as the Court shall modify; unless, before the lapse of the time so fixed, special application shall be made for such prorogation. It is only granted on cause shown. The party failing to report a diligence shall be held to have abandoned his wish to recover writings by a diligence, and circumduction shall be granted for not reporting (A. S. 11 July 1828, s. 108). Prorogation of time for

complying with any order of Court is no longer competent of consent (Court of Session Act, 1868, s. 26). The diligence may be reported on any box-day in vacation or recess (13 & 14 Vict. c. 36, s. 27).

By A. S. 22 Feb. 1688, havers are ordained "to answer to all special pertinent interrogatories in relation to their having of the writs or putting the same away, or as to their knowledge and suspicion by whom the same were taken away, or where they presently are, that the pursuer may thereby make discovery, and recover the same: Declaring always, that upon advising of the defender's oath, they shall not be otherwise deemed against as havers of the said writs, unless it be found that they had the same since the citation, or fraudulently put them away at any time." It is incompetent to examine a haver on the merits of the cause (*Dye*, 1831, 9 S. 342); and he, on the other hand, cannot refuse to produce the writings called for, on the general allegation that they could not benefit the party seeking production (*Lady Mary Campbell*, 1783, M. 3973). He may, however, state the objection that they are plainly irrelevant (*Cunningham*, 1889, 16 R. 383, as contrasted with *Lowe*, 1843, 5 D. 1261). And while he is not bound to criminate himself, he may be forced to produce documents injurious to his character (*Graham*, 1847, 9 D. 545; *Don*, 1848, 10 D. 1046). The primary object is to recover documents; but another object is to ascertain if the document has ever been in the haver's possession, and if so, how and when it passed therefrom. Accordingly, if he depone that he had it, and destroyed it, he may be asked (and the questions should be put separately), when, where, how, and why he destroyed it (*Cullen*, 1863, 1 M. 284; *Gordon*, 1865, 3 M. 938). Thus the deposition of a haver may be used as evidence of the existence of an instrument (*Boyd*, 1821, 1 S. 144), or of its non-existence (*Home*, 1842, 4 D. 1184), or of the *casus amissionis* in an action of proving the tenor (*Falconer*, 1849, 11 D. 1338); but it cannot be used as that of a witness on the merits (*Dye*, *Falconer*, and *Cullen*, *ut supra*; *Scott*, 1821, 2 Murray, 494; see also *Campbell*, 1827, 4 Murray, 178, where the haver had died before the trial). Where the haver has satisfied the person who obtained the diligence by a partial production, he may be asked by the opposite party whether he has other documents bearing on the matter in issue (*Dunlop's Trs.*, 1852, 14 D. 825); and if he have, may be required to make full production (*Thorburn & Trueman*, 1853, 15 D. 767).

In considering the questions, what documents are recoverable by diligence, and when may they be recovered, a distinction is to be taken between the right of a person to recover documents in which he has a direct and legal interest, and the right of a litigant to claim that writings in which he has no such interest be produced for the purposes of the action. In the former case, the call may be made at any time in the preparation of a cause, or where no cause is depending and the purpose is to acquire information as to the extent of a right (*Hepburn*, 1637, M. 3964; *Provan*, 1830, 3 Deas & And. 49). The same rule applies to a person who has a joint interest in a document with him from whom he seeks to recover it (*Ministers of Edinburgh*, 1763, M. 3969; *Macgregor*, 1823, 2 S. 461; *Great North of Scotland Rwy. Co.*, 1856, 18 D. 790). In the latter case, it will be sustained solely for the special purpose of enabling a party to prove his averments; and it arises only after issue has been joined on the facts (Tait, 176; *Mackintosh*, 1828, 6 S. 784). This proposition is, however, subject to the exception that it is in the discretion of the judge to whom the motion for diligence is made, to grant it, on cause shown, before the closing of the record (*M'Hquham & Co.*, 1850,

13 D. 403). Thus, if a person bring an action of a sufficiently precise nature, he may obtain a diligence to make his averments specific; but he will not obtain it if, without any definite notion as to the nature of his case, he is merely fishing for grounds of action (*Greig*, 1855, 18 D. 193). While no general principle can be extracted from the cases, it may be said that the tendency is to relax the rule against granting diligence before the record is closed (*Marshall & Son*, 1882, 19 S. L. R. 696, *per* Ld. Fraser; Mackay, *Manual*, 246; Dickson, s. 1370 (c)). In considering a motion for diligence, the Court do not determine beforehand whether the writings sought to be recovered will be admissible as evidence. It must be plain, however, that they are of such a kind as may be so used; otherwise a motion for their production will not be granted (*Livingstone*, 1860, 22 D. 1333; *Emslie*, 1862, 1 M. 209; *Huxton*, 1863, 35 Sc. Jur. 596; *Porter*, 1867, 5 M. 533; *M'Neill*, 1880, 7 R. 574). Thus letters written but not sent (*Livingston*, 1831, 9 S. 757; *Hogg*, 1864, 2 M. 1158), defences prepared but not given in (*Garin*, 1830, 9 S. 213), the correspondence of persons who can be called as witnesses (*Livingstone*, 1860, 22 D. 1333; cf. *Tunnett, Walker, & Co.*, 1873, 11 M. 931, and *Henderson*, 1892, 20 R. 95), the diaries of the living (*Hogg* and *M'Niel*, *ut supra*), and the private books of a partner demanded in order to establish a fact provable only by the firm's writ (*Catto, Thomson, & Co.*, 1867, 6 M. 54), cannot be recovered. Where the object of the person craving the diligence is to use the documents in taking precognitions, or in examining witnesses (*M'Loskey*, 1843, 5 D. 1013; *Livingstone*, *ut supra*; cf. *Tunnett, Walker, & Co.*, *ut supra*), or in amending the record under the Court of Session Act, 1868 (*Thomson*, 1869, 7 M. 687), the motion will be refused.

Diligence will be granted for the recovery of the business books of the opposite party or of third persons, in order that such entries as are competent and relevant evidence may be excerpted therefrom (Mackay, *Manual*, 248). Thus the defenders in an action of damages for personal injuries were allowed to recover the pursuer's business books and income-tax receipts (*Johnston*, 1892, 20 R. 222; cf. *Craig*, 1888, 15 R. 808; *British Publishing Co.*, 1892, 19 R. 1008; and see *Somerville*, 1896, 23 R. 576, as to the right of the pursuer in an action of damages for breach of promise of marriage to recover the defender's books in order to ascertain his financial position). The Court will be careful to confine the diligence to such entries, and to protect from disclosure entries relating to private matters, which do not affect the question between the parties (*Wark*, 1855, 17 D. 526; *Addie*, 1864, 2 M. 809; *North British Rwy. Co.*, 1893, 20 R. 397). The necessary entries will be excerpted at the sight of a commissioner (Dickson, s. 1395). In cases where fraud has been specifically averred, *e.g.* by a shareholder in a bank against the directors, a general diligence has been granted (*Tulloch*, 1858, 20 D. 1319; *Dobbie*, 1860, 22 D. 1113; and cf. *Macleod*, 1891, 28 S. L. R. 865; see also *Ministers of Edinburgh, Macgregor*, and *Great North of Scotland Rwy. Co.*, *ut supra*, and the rule based thereon). In general, books will be regarded as recoverable only where they have a direct bearing on the points in issue (cf. *D. of Buccleuch*, 1866, 4 M. 475, with *Robertson*, 1875, 2 R. 935), and where they afford the proper and primary evidence of the facts which it is sought to establish by their production (cf. *Steven*, 1875, 2 R. 292, with *Porter*, 1867, 5 M. 533).

A general diligence will not be granted for production of the title-deeds of the opposite party; for a person is not entitled to ransack his opponent's charter chest in order to find grounds for his own haphazard statements

(*Scott*, 1737, M. 358, 3965; Elch. "Witness," No. 3: 1749, 1 Pat. App. 441; *Pattinson*, 1844, 6 D. 944; *Greig*, 1855, 18 D. 193; see also *Smith*, 1815, and *Auld*, 1818, not reported, and noted in Tait, 178–9; Dickson, ss. 1371, 1373). In order to warrant a recovery of title deeds, a special case must be stated, or point made, and that with reference to special documents (*Richardson*, 1867, 5 M. 586, *per* L. J. C. Patton: *Cairncross*, 1765, 5 Bro. Supp. 912; *Riggs*, 1861, 23 D. 1251). A third party's title deeds cannot in general be recovered under a diligence (*Fisher*, 1827, 6 S. 330; *Riggs, ut supra*; and see EXHIBITION, ACTION OF).

The original of a registered instrument, or recorded process, etc., cannot be recovered from the keeper of the register, if he state that to produce it would be prejudicial to the public interest. Application must be made for a warrant of transmission (A. S. 24 Dec. 1838, s. 15; A. S. 16 Feb. 1841, s. 20; Mackay, *Manual*, 248), save where extracts will suffice (*Maclean*, 1861, 23 D. 1262).

As to the recovery of official and other privileged writings, see CONFIDENTIAL COMMUNICATIONS. An interlocutor granting recovery need not contain an express reservation in respect of confidential documents; for such a reservation is implied (*M'Donald*, 1844, 6 D. 954).

Diligence will not be granted for the recovery of foreign registers and documents in the custody of foreign Courts (*Maitland*, 1885, 12 R. 899; the proper course is to cite the custodiers as witnesses (*ib.*)); or of models (*Fleming*, 1864, 2 M. 1032).

[See Mackay, *Manual*, 241–9: Dickson, *Evidence*, ss. 1361 *et seq.*; Kirkpatrick, *Digest*, ss. 180, 214–17.] See BOOKS; CONFIDENTIAL COMMUNICATIONS; WITNESS.

3. *The Evidence of Witnesses, Aged, Sick, or Infirm, or intending to go Abroad, or Resident beyond the Jurisdiction, may be taken on Commission.*—(Bankt. iv. 30. 27: Stair, iv. 41. 7: Ersk. iv. 2. 31). Where issues have not been adjusted or diet of proof fixed, an application may be made (by a motion, in practice: Mackay, *Manual*, 367) to the Inner House or to the Lord Ordinary before whom the cause depends in session (*Hunt*, 1856, 18 D. 317), and to the Lord Ordinary on the Bills in vacation (A. S. 11 July 1828, s. 117), to take the depositions to lie *in retentis*. The motion is competent so soon as the summons or petition has been executed, and before it has been called (Mackay, *Manual*, 367; Dickson, ss. 1732, 1734; *Hunson*, 1873, 1 R. 237). It may be made to the Lord Ordinary after a reclaiming note which does not remove the cause to the Inner House (see *Riddell*, 1890, 18 R. 1), and to the Inner House after an appeal to the House of Lords (Mackay, *Manual*, 367). Whenever made, forty-eight hours' notice must be given to the opposite agent, save in cases of great urgency (*A. B.* 1831, 4 Deas & And. 252; *E. of Winton*, 1710, M. 12096), and the names of the witnesses to be examined should be intimated. But commission has been granted to examine witnesses named "and such other witnesses as shall be proved to the commissioner to be in a bad or dangerous state of health, or to be above seventy years of age" (*Watsons*, 1829, 8 S. 261: *Morison*, 1828, 6 S. 1082; *Hunt, ut supra*): and an interlocutor in similar terms has been pronounced, on condition that a list of witnesses should be furnished to the opposite party a certain number of days before the date proposed for their examination (*Oswald*, 1824, 3 S. 381: *Gardner*, 1825, 3 S. 613; *Ramsay*, 1825, 3 S. 643: see also *Mags. of Glasgow*, 1827, 5 S. 915). It is not the practice to require a condescendence of the facts upon which the witnesses are to be examined (*Watsons, ut supra*: *Cameron*, 1830, 8 S. 435): and as the Court empowers the commissioner to examine such witnesses

as are proved to be aged, it is not necessary to produce certificates to that effect when applying for the commission (*Watsons* and *Morison, ut supra*; see, however, Mackay, *Manual*, 366, who says that where the ground of the application is infirm health, medical certificates on soul and conscience shall be produced when the motion is made). If the witness be alive and within the jurisdiction of the Court after issues have been adjusted or proof ordered, he should, in strictness, be examined upon written interrogatories (*Watson*, 1837, 15 S. 753, 763; *Boettcher*, 1861, 23 D. 322). But it is the practice, if he cannot attend the trial, to dispense of consent with the interrogatories, and to receive the deposition (Mackay, *Manual*, 368; Dickson, s. 1741). Mackay observes (*Manual*, p. 266) that a commission to take the evidence of aged witnesses to lie *in retentis* has been refused where the evidence of other equally good witnesses is available.

Witnesses upwards of seventy years of age may be examined in this way (*Forbes*, 11 Mar. 1820, F. C.; *Harvey's Trs.*, 1827, 5 S. 896; *Morison*, *Watsons*, and *Hunt, ut supra*; cf. *Hay*, 1859, 22 D. 183). If within that age, their depositions will be taken only on special cause shown (*Ross*, 1856, 18 D. 986; *Hay, ut supra*), *e.g. penuria testium* (*E. Fife*, 11 Mar. 1815, F. C.; *Copland*, 1827, 5 S. 272).

A commission has frequently been granted where the witness was so ill as to render it unlikely that he could attend the trial (see *Gordon*, 1849, 11 D. 1358). As to the effect of *penuria testium* in such case, see *E. Fife* and *Copland, ut supra*; see also *Malcolm*, 1829, 7 S. 715, where of consent such a commission was granted to examine witnesses residing abroad, and not alleged to be in danger of life.

This mode of examination has been allowed in the case of persons employed on shipboard (*Gray*, 1849, 11 D. 1489; where distinction was made between those temporarily and those permanently residing in this country), or in the army (*A. B.* 1831, 4 Deas. & And. 252), or navy (*Clouston*, 1848, 20 Sc. Jur. 228), or about to emigrate (*Monro*, 23 June 1831, F. C.; cf. *Ferrier*, 1822, 1 S. 560). As to the effect of *penuria testium* in this case, see *E. of Lauderdale*, 1696, M. 12095; *E. of Annandale*, 1700, M. 12095; cf. *Copland*, *ut supra*). Commission has been refused (*Munn*, 1854, 16 D. 385), and granted (*Sutter*, 1858, 30 Sc. Jur. 300), to examine seamen in the employment of the person craving therefor. In the latter case, the motion was made by the defenders, and the pursuers' witnesses were either going or had gone to Greenland. The perils of a whaling voyage, and the statement of the pursuers that they did not intend the trial to take place till the end of the whale fishing, seem to have been the determining considerations.

Whether a commission to take the deposition of the pursuer or defender to lie *in retentis* will be granted, depends altogether upon the circumstances of the case. (In *Donnar*, 1859, 21 D. 1301; *Laing*, 1866, 4 M. 327; *Sheard*, 1867, 5 M. 636 (under reservation of the competency); *Hansen*, 1873, 1 R. 237: and *Samson & Co.*, 1886, 13 R. 1154, it was granted; in *Sofio*, 1867, 39 Sc. Jur. 268, it was refused.)

After issues have been adjusted or diet of proof fixed, the case falls within the A. S. 16 Feb. 1841, which applies not only to jury trials but to cases set down for trial before a judge (*M'Lean & Hope*, 1867, 5 M. 579). It provides that "when it shall be made out upon oath to the satisfaction of the Court (see *Willox*, 1848, 10 D. 807) that a witness resides beyond the reach of the process of the Court, and is not likely to come within its authority before the day of trial, or cannot attend on account of age or permanent infirmity, or is labouring under severe illness which renders it doubtful whether his evidence may not be lost, or is a seafaring man (see

Napier, 1859, 21 D. 1154; cf. *Sutter, ut supra*), or is obliged to go into foreign parts, or shall be abroad and not likely to return before the day of trial, it shall be competent to examine such witness by commission on interrogatories to be settled by the parties, and approved by one of the principal Clerks of Session, or record clerk" (s. 21).

In session, the motion is made to the Lord Ordinary or Division before whom the cause depends. In vacation, "it shall be heard before the judge who is to preside at the trial, if in Edinburgh, or by a judge who is appointed to be upon the circuit on which the cause is to be tried, if the trial is to be on circuit; and in case of the absence of either of them respectively, by the Lord Ordinary on the Bills; it being shown to the satisfaction of the judge before whom the motion is made that it could not have been made during session" (A. S. 16 Feb. 1841, s. 21). The names of the witnesses to be examined must be given (*Gray*, 1849, 11 D. 1023; *M'Lean & Hope*, 1867, 5 M. 579). The affidavits produced in support of the motion must state the witness' inability to attend the trial (*Mackintosh*, 1859, 21 D. 783). Still, in the latest case, the Court dispensed with his attendance, even in the absence of such a statement (*Henderson*, 1870, 8 M. 833; cf. *Dobbie*, 1856, 19 D. 195; *Mackintosh, ut supra*). A commission has been granted even during the course of the trial, where a witness has become ill since citation (*Stone*, 1849, 11 D. 1041; *Lord Forbes*, 1830, 5 Murray, 289, *per* Ld. Gillies). If, however, the party citing him is aware before the jury is empanelled and sworn that he cannot attend on this account, motion should be made to postpone the trial (A. S. 16 Feb. 1841, s. 25).

Under the A. S. above cited, the adjustment of interrogatories is imperative (*M'Lean & Hope, ut supra*). In practice, however, they are commonly dispensed with of consent (Mackay, *Manual*, 369; Dickson, s. 1747; see *A. B.* 1831, 4 Deas & And. 252). It has been pointed out that they may be very useful in foreign commissions, where no skilled lawyers are procurable to examine the witnesses (*M'Lean & Hope, ut supra*, per L. J. C. Patton). Where one party has obtained a commission, "it shall be competent to the other party to have a joint commission, or to propose cross-interrogatories to such witness, to be settled as aforesaid; and, in addition to the interrogatories so settled, it shall be competent to the commissioner to put such additional questions to the witnesses as may appear to him to be necessary, taking care to mark the question so put as put by him." Further, "when one party obtains a commission to examine witnesses, and does not use the evidence obtained under the commission, the other party may use the evidence given under it at the trial, provided he satisfies the Court at the trial that he could not bring the witness or witnesses whose evidence he proposes to read; in which case he shall be liable for the expense of the commission" (A. S. 16 Feb. 1841, s. 17). "On its being established at the trial to the satisfaction of the Court by affidavit, or by oath" (a certificate has been admitted of consent; *Scott*, 1826, 4 Murray, 63), "in open Court, that the witness is dead, or cannot attend owing to absence, age, or permanent infirmity" (see *Ainslie*, 1851, 14 D. 184; 1852, 1 Macq. 299; *Boettcher*, 1861, 23 D. 322), "it shall be competent to use at the trial the evidence so taken, subject to all legal objections to its admissibility" (*ib.*). "The depositions taken on commission shall not be used, if the witnesses so examined shall afterwards be brought forward at the trial" (*ib.*). Where a witness, examined at the first trial of a cause, died before the second trial, his deposition, taken on interrogatories before the first, was admitted at the second, trial (*Willox, ut supra*. See that case, and *Muir*, 1840, 2 D. 751, as to re-examination with a view to a second trial).

Unless witnesses out of the United Kingdom attend voluntarily, their evidence must be taken on commission. If they are resident outwith Scotland, but in any other part of the United Kingdom, the Court of Session, or, when the Court is not sitting, any judge of the Court, may, in his or their discretion (*Henderson*, 1870, 8 M. 833; *D. of Athole*, 1878, 5 R. 845; *Macdonald*, 1892, 20 R. 217), cite them to attend the trial (17 & 18 Vict. c. 34, ss. 1–4). Sec. 5 of the Act provides that "nothing herein contained shall alter or affect the power of any of such Courts to issue a commission for the examination of witnesses out of their jurisdiction, in any case in which, notwithstanding this Act, they shall think fit to issue such commission."

Where a civil suit is in dependence in a Court of one part of the United Kingdom, that Court may issue a commission for the examination of witnesses in any other part of the United Kingdom, and the Court of competent jurisdiction in that other part has power to enforce the attendance of witnesses before the commissioner, and to regulate the method of examination (22 Vict. c. 20; *Campbell*, 1867, 5 M. 850; affd. 1869, 41 Sc. Jur. 584). Further, where a commission has been addressed to any Court or judge of a Court in India or the colonies, or elsewhere in Her Majesty's dominions beyond the jurisdiction of the Court granting the commission, the Court or judge addressed may nominate some fit person to take the examination (48 & 49 Vict. c. 74, s. 2). By A. S. 15 Mar. 1890, provision is made for obtaining, by application to the Court, a letter of request addressed to the judge or judges of the foreign tribunal within whose jurisdiction the witness whose evidence is required is residing. The letter, along with the adjusted interrogatories, is to be forwarded by the clerk to the process to Her Majesty's Secretary of State for Foreign Affairs, requesting that the evidence taken under the same, when received, shall be forwarded to him, under seal, to abide the orders of the Court.

It is competent for a Sheriff to grant commissions to take evidence either where the witnesses are beyond the jurisdiction of the Court, or where, by reason of age, infirmity, or sickness, they are unable to attend the diet of proof (16 & 17 Vict. c. 80, s. 10; see sec. 11 cited above (2)), and in no other case, even of consent (*Byres*, 1866, 4 M. 388; *Steuart*, 1867, 5 M. 736). The A. S. 2 Feb. 1893, makes provision for obtaining a letter of request on application to the Sheriff.

[See Dickson, *Evidence*, ss. 1702, 1742–53; Mackay, *Manual*, 365 *et seq.*]

4. *The whole Evidence in certain Cases may be taken on Commission on Special Cause shown* (see *Cameron*, 1861, 23 D. 1257; *Watt*, 1857, 19 D. 787; in Mackay's opinion (*Manual*, 371), the grounds on which the commission was granted in *Fairholme*, 1856, 19 D. 178, and *Jack*, 1857, 19 D. 862, would not now be deemed sufficient).—Such a course is competent in all cases other than those appropriated to jury trial (6 Geo. IV. c. 120, s. 28; 13 & 14 Vict. c. 36, s. 49; *Nicol*, 1872, 10 M. 351), and consistorial causes (24 & 25 Vict. c. 86, s. 13).—[See Mackay, *Manual*, 370 *et seq.*]

5. *In the Case of a Suit depending in a Foreign Court.*—The provisions of the Act 22 Vict. c. 20, are noticed above (3). The Act 19 & 20 Vict. c. 113, provides that where the Court of Session is certified that a competent foreign tribunal, in which any civil or commercial matter is pending, is desirous of obtaining the evidence of witnesses within the jurisdiction of the Court first mentioned, the latter Court may order their examination before any person named in such order (*Blair*, 1883, 10 R. 1223; *Robinow*, 1883, 10 R. 1246; *Stemrich*, 1886, 13 R. 1156; *Reid*, 1890, 17 R. 790), and the production of documents (ss. 1, 6). A certificate by the diplomatic agent of any foreign power, or, if there be no such agent, of the consul-general or consul at

London, that the matter of the application is a civil or commercial matter pending before a Court of the country which he represents, shall be evidence of the matter so certified. In the absence of such certificate, other evidence is admissible (s. 2). These provisions are made applicable to criminal proceedings by 33 & 34 Vict. c. 52, s. 24; see *Quosbarth*, 1892, 29 S. L. R. 456.

[See Dickson, *Evidence*, ss. 1702–3; Mackay, *Manual*, 371.]

Form of Commission.

At , the day of eighteen hundred and years;—

There was produced to *A. B.* [*designation*], a certified copy interlocutor, dated the day of eighteen hundred and years, pronounced by Lord *C.*, Ordinary, in the action [*or* petition] depending before the Lords of Council and Session at the instance of *D. E.*, pursuer, against *G. H.*, defender, whereby, *inter alia*, commission is granted to the said commissioner to take the oaths and examinations of witnesses [*or* to examine havers] in the said action [*or* petition]; of which commission the said *A. B.* accepted, and made choice of *J. K.* to be his clerk, and administered to him the oath *de fideli administratione*.

Thereafter compeared the pursuer personally [*if such be the case*], and by *L. M.*, his agent; as also the defender personally [*if such be the case*], and by *N. O.*, his agent.

Compeared *P. Q.* [*designation and address*], aged , who being solemnly sworn and interrogated as witness for the pursuer [*or* defender], [*or* examined on behalf of the pursuer (*or* defender) as haver, and asked to produce the writings specified in No. of process], depones . . . All which is truth, as the deponent shall answer to God [*specify delete words, marginal additions, etc.*].

P. Q.
A. B., Commissioner.
J. K., Clerk.

Docquet at the End of Proof when concluded.

What is contained on this and the preceding pages is the report of the commissioner mentioned on the first page hereof.

Humbly reported by *A. B., Commissioner.*
J. K., Clerk.

Commissioner of Police.—A commissioner of police is a person who acts under and in virtue of the Burgh Police (Scotland) Act, 1892, or, where there are private Police Acts, as there are in some burghs, under and in virtue of these for the respective burghs to which the same applies. In burghs where there are magistrates, or magistrate and councillors or other municipal authority, they are the commissioners under the Burgh Police Act. In all other burghs the commissioners are the persons elected under the Act. Any male householder not in arrear with any burgh assessment is eligible as a commissioner; but a person adjudged bankrupt is disqualified from being elected, or holding or exercising the office of commissioner (46 & 47 Vict. c. 32, s. 32; 47 & 48 Vict. c. 16, s. 5; see *Thom*, 28 Feb. 1885, 12 R. 701). The number of commissioners in burghs where the population is less than 10,000 is from nine to twelve, as fixed by the Sheriff; 10,000 to 20,000, twelve; 20,000 and 50,000, fifteen; between 50,000 and 100,000, eighteen to twenty-four. The election is annual, and a register of voters is made up yearly before 15th September, the procedure followed as to such register being, as far as practicable, similar to that prescribed by the Acts for the registration of parliamentary voters for burghs. See MUNICIPAL ELECTION. Where the burgh is divided into wards, the election takes place for the wards in like manner to that of town councillors. For all the purposes of the annual election, first meeting of commissioners, and election of magistrates and other procedure consequent thereon, a burgh under the Burgh Police Act is deemed to be a

burgh having to provide for the appointment and election of magistrates and councillors in royal and parliamentary burghs. The commissioners are a corporate body having a common seal, who sue and are sued under their corporate name. They have large powers of contracting, assessing, and borrowing under the Act, which must all be done in strict conformity with the provisions thereof. They have full power to appoint the several public officers necessary for the administration of the Act, pay them salaries, and dismiss them. They are the Local Authority under the Public Health (Scotland) Act, 1867, and Acts amending the same, within the territory comprehended in the burgh. The magistrates and commissioners elected in virtue of the Burgh Police Act for the purposes thereof within the limits of the burgh, possess such and the like rights, powers, authorities, and jurisdiction as are possessed by the magistrates and council of royal and parliamentary burghs. They are thus practically trustees for the execution of the Act within the burgh, subject to all the responsibilities, liabilities, and disabilities which persons in a fiduciary position are subject to, over and above the restrictions and limitations imposed upon them by the Police Act.

Commissioner to the General Assembly.—The Statute of 1592, c. 114, "declaris that it sall be lawfull to the kirk and ministers, every zeir at the least and oftner *pro re nata* as occasion and necessitie sall require, to hald and keepe generall Assemblies: Providing that the King's Majestie, or his Commissioners, with them to be appointed be his Hienesse, be present at ilk generall Assemblie, before the dissolving thereof, nominate and appoynt time and place quhen and quhair the nixt generall Assemblie sall be halden; and in case nither his Majestie nor his said Commissioners beis present for the time in that toun quhair the said generall Assemblie beis halden: Then and in that case it sall be lesum to the said generall Assemblie be themselves to nominate and appoynt time and place where the nixt generall Assemblie of the kirk sall be keiped and halden, as they have bene in use to do thir times bypast." In practice, only one Commissioner is appointed. His commission is issued under the Great Seal of Scotland, and expires with the termination of the sittings of the Assembly for which he was appointed. On the Commissioner presenting his Commission, it is read and recorded among the Acts of the Assembly. The Commissioner, as the representative of the sovereign, is the official medium of communication between the sovereign and the Assembly, but has no voice in the deliberations of the House in virtue of his office. Both the Church and the Crown claim right to convene and dissolve Assemblies. Between 1691 and 1695 there was considerable tension between the Church and the Crown in respect of these claims. In November 1691, the Assembly did not meet on the appointed day, in consequence of the absence of the Commissioner. It was thereafter summoned by Royal Proclamation to meet on 15th January 1692. After it had met on that date, and sat for about a month, but had failed to meet the views of the king on points which he had by letter submitted to it, the Commissioner declared the Assembly dissolved, and declined to name a day for the meeting of the next Assembly. The Assembly separated, but, before doing so, fixed a day itself on which it should reassemble. Eventually it did not meet on the day it had fixed, and the next Assembly, 1695, was called by Royal Proclamation. Since 1695, no conflict has occurred between the Crown and the Church in these matters. The practice at the close of an Assembly is for the Moderator to declare that, in the name

of the spiritual Head of the Church, he dissolves the Assembly, and appoints it to meet again on the date which he then names. The Commissioner then makes a similar declaration that, in the name of the sovereign, he dissolves the Assembly, and appoints it to meet again on a date which he names. By previous arrangement, the Moderator and the Commissioner name the same date. In 1746, the Commissioner did not arrive on the day appointed for the opening of the Assembly. In 1761, it was reported to the Assembly by the Lord Advocate that the Commissioner was in the town, but that, owing to the death of an official, his commission was not completed. In 1798, the commission and Royal Letter accompanying it were laid on the table of the Assembly, but the Commissioner, owing to family bereavement, did not attend till some days later. In all these cases the Assembly convened on the appointed day, and proceeded to business. When, from any cause, the Commissioner was unable to continue to be present, it was at one time the practice for the Assembly to resolve itself into a committee of the whole House, which carried on the business, and had its actions formally adopted on the House resuming. Since 1825 this has not been considered necessary, and the Assembly proceeds in his absence. The Commissioner is invariably a peer; his official style is "His Grace the Lord High Commissioner to the General Assembly." His salary is appointed to him from the Consolidated Fund.

[Acts and Proceedings of the General Assembly; Hill, *Prac.* 87; Cook, *Styles*, 5th ed., 311; Ersk. i. 5. 6.]

Commissioners in Sequestration.—Commissioners in sequestration are an elective committee of creditors who advise with the trustee regarding the management and realisation of the estate, and whose concurrence is required in certain acts of administration. Their office is gratuitous, and they are not required to find caution. At the meeting for the election of a trustee, the creditors present or their mandataries, after the trustee has been elected, elect three commissioners (if there be so many creditors claiming on the estate), who must be creditors or mandataries of creditors (19 & 20 Vict. c. 79, s. 75). The proceedings for their election are similar to those for the election of a trustee (*ib.* ss. 75, 68). The Sheriff decides who are the persons duly elected, and his decision is final. His deliverance is entered in the Sederunt Book, and no further confirmation is required. No person is eligible for the office who is disqualified to be trustee (see s. 68; Goudy on *Bankruptcy*, 229). A majority of the commissioners constitute a quorum. Where there are only two, it seems necessary that they should concur. A commissioner may resign office at any time. He may be removed by a majority in value of creditors at a meeting duly called for the purpose, and a new commissioner may be elected in his place (*ib.* s. 76; see *Thomson*, 1859, 21 D. 1129). He may also be removed or censured by the Court, on a report by the Accountant of Court, if his duties are not being faithfully performed (*ib.* s. 159). There is no provision in the Bankruptcy Act, 1856, for a creditor applying to the Court for the removal of a commissioner, although formerly this was competent (54 Geo. III. c. 137, s. 71; *Sanders*, 1823, 2 S. 173; *Parlane*, 1825, 4 S. 122). A mandatary who holds office ceases to do so on intimation to the trustee by the creditor of the withdrawal of the mandate (19 & 20 Vict. c. 79, s. 75). In all cases where a commissioner has declined to act, or resigned, or become incapacitated, the trustee must call a meeting of creditors (see ss. 98, 99) for the purpose of electing a new commissioner; and such election is conducted

in the same way as the original election (*ib.* s. 75; see *Gunn*, 1850, 13 D. 317, as to appeal against resolution that office had become vacant). Until a vacancy has been filled up by a new appointment, the remaining commissioners are entitled to act (*Caddell*, 8 July 1819, Bell, *Com.*, 5th ed., ii. 386 (note)). A creditor is only entitled to act as a commissioner so long as he has an interest in the sequestrated estate (Bell, *Com.*, 5th ed., ii. 385).

The duties of commissioners are regulated by the Bankruptcy Act, 1856. Sec. 82 provides that "the trustee shall manage, realise, and recover the estate belonging to the bankrupt, wherever situated, and convert the same into money according to the directions given by the creditors at any meeting, and if no such directions are given, he shall do so with the advice of the commissioners." Sec. 85 provides: "The commissioners shall superintend the proceedings of the trustee, concur with him in submissions and transactions, give their advice and assistance relative to the management of the estate, decide as to paying or postponing payment of a dividend, and may assemble at any time to ascertain the situation of the bankrupt estate, and any one of them may make such report as he may think proper to a general meeting of the creditors." They are entitled to access to the sederunt book and the trustee's accounts, and also documents of a confidential nature regarding the estate (*ib.* s. 84). Any commissioner, with notice to the trustee, may at any time call a meeting of the creditors (*ib.* s. 98). The notice must be given prior to calling the meeting (*Campbell*, 1884, 21 S. L. R. 479; see *Lang's Tr.*, 1892, 19 R. 488).

Within fourteen days after the expiration of four months from the date of the deliverance awarding sequestration, the commissioners meet and examine the trustee's state of funds and account of intromissions, and ascertain whether the trustee has lodged the moneys recovered by him in bank, debit him with 20 per cent. on sums not so lodged amounting to £50 or upwards, audit his accounts, settle his commission and authorise him to take credit therefor, certify the balance due to or by him, and declare whether any and what dividend shall be paid (19 & 20 Vict. c. 79, s. 125). They have corresponding duties with regard to subsequent dividends (*ib.* ss. 130, 132). Where a composition is offered by the bankrupt, the commissioners, before the composition is approved of by the Court, must audit the trustee's accounts, ascertain the balance due to or by him, and fix his remuneration (*ib.* s. 141). If it appears to the commissioners that a dividend ought to be postponed, they may do so until the recurrence of another stated period for making a dividend, and authorise the trustee to give notice to that effect in the next *Gazette* (*ib.* s. 134). They may also concur with the trustee in an application to the Court for alteration of the periods for payment of dividends (*ib.* s. 135).

The concurrence of the commissioners is required for the exercise of certain powers by the trustee, such as fixing the price of heritable estate for sale, fixing a meeting of creditors to consider as to the sale of the whole estate, and compromising or referring claims against the estate (*ib.* ss. 114, 136, 85, 176).

When estate is sold publicly, commissioners are not entitled to purchase (*ib.* s. 120; see *Drew*, 1825, 4 S. 264; *Whyte*, 1890, 17 R. 895). Commissioners are liable to account for their intromissions and management on petition by anyone interested (*ib.* s. 86); but they are not liable for damage caused to the estate in consequence of the trustee acting upon their advice (*Wilson*, 1803, M. 13968). The sanction of the commissioners does not affect the personal responsibility of the trustee for obligations undertaken

by him, or for failure to perform statutory duties incumbent on him (*Jeffrey*, 1821, 1 S. 103, 2 S. App. 349; *Maben*, 1837, 15 S. 1087).

[Goudy on *Bankruptcy*, 228 *et seq.*]

Commissioners of Justiciary.—See JUSTICIARY, HIGH COURT OF.

Commissioners of Supply.—Previous to the Local Government (Scotland) Act, 1889, the powers and duties of the Commissioners of Supply in a county were very extensive; but by sec. 11 of that Act the whole powers and duties of the Commissioners of Supply, with certain exceptions, were transferred to and vested in the County Council of each county.

Powers and Duties.—The powers and duties still left to the Commissioners are: (*a*) The election of their own convener (L. G. Act, 1889, s. 12); (*b*) a share in the control of the police administration and the borrowing and capital expenditure of the county, by the election of representatives to the Standing Joint-Committee (L. G. Act, 1889, s. 18); (*c*) adjudication on claims for admission to their own body under the provisions of 19 & 20 Vict. c. 93, and 20 Vict. c. 11 (L. G. Act, 1889, s. 12); (*d*) their power as Commissioners of the Land Tax (L. G. Act, 1889, s. 102). The Commissioners of Supply meet annually, in the same place and on the same day, as the meeting of the County Council, in the month of May in each year, for the purpose of appointing members of the Standing Joint-Committee; disposing of claims and objections under the provisions of the Commissioners of Supply (Scotland) Act, 1856, and its amending Act, 20 Vict. c. 11, and for the purpose of electing a convener: but at this meeting the Commissioners are not permitted to transact any other business (L. G. Act, 1889, s. 12 (2)). The Commissioners at this meeting appoint certain of their number, not exceeding seven, to sit upon the Standing Joint-Committee of the County Council. The Standing Joint-Committee consists "of such number of County Councillors, not exceeding seven, as shall be appointed by the County Council annually at their meeting in the month of May, and such number of Commissioners of Supply, not exceeding seven, as shall be appointed by the Commissioners of Supply annually at their meeting on the same day" (L. G. Act, 1889, s. 18). The Standing Joint-Committee act as the Police Committee of the county under the Police Act, 1857, and their consent is required to capital expenditure in regard to works, and in regard to borrowing (L. G. Act, 1889, ss. 18 (6) and (67)). See STANDING JOINT-COMMITTEE. If any Commissioner of Supply serving upon the Standing Joint-Committee dies, resigns, or becomes disqualified, the vacancy so caused may be filled up by the Commissioners of Supply, at a meeting called by their convener on not less than ten days' notice by circular addressed to each Commissioner of Supply (L. G. Act, 1889, s. 12 (3)). The Commissioners of Supply have duties in regard to the land tax, which consist in allotting the valued rent of, and the *cumulo* tax due for, lands which have been subdivided. See LAND TAX. (Rankine on *Landownership*, 3rd ed., 727, and *infra*.) Questions as to the division and allocation of the old valued rent of lands are determined by the Sheriff (L. G. Act, 1889, s. 102).

Qualification of Commissioners of Supply.—The qualification for Commissioners of Supply was fixed by the Valuation Act, 1854 (17 & 18 Vict.

c. 91, s. 19), as follows: "The being named an *ex officio* Commissioner of Supply in any Act of Supply, or the being proprietor or the husband of any proprietor infeft in liferent, or in fee not burdened with a liferent, in lands and heritages within the county of the yearly rent or value, in terms of this Act, of at least £100, or the being eldest son and heir-apparent of a proprietor infeft in fee not burdened with a liferent in lands and heritages within such county of the yearly rent or value, in terms of this Act, of £400; and the factor of any proprietor or proprietors infeft either in liferent or in fee unburdened as aforesaid, in lands and heritages within such county, of the yearly rent or value, in terms of this Act, of £800, shall be qualified to act as Commissioner of Supply in the absence of such proprietor or proprietors; provided always that, with reference only to the qualification of Commissioners of Supply under this Act, the yearly rent or value of houses and other buildings, not being farmhouses or offices or other agricultural buildings, shall be estimated at only one-half of their actual yearly rent or value in terms of this Act." By the Commissioners of Supply Acts of 1856 and 1857 (19 & 20 Vict. c. 93, and 20 Vict. c. 11), all persons, being males and of full age, possessing the qualifications above set forth, otherwise than by nomination *ex officio* are Commissioners while so qualified (s. 1). The last completed Valuation Roll of the county is *primâ facie* evidence of ownership and conclusive evidence of the value (s. 2). A parish minister possessing as part of his benefice a glebe worth £100 a year is not qualified, not being "infeft in liferent or in fee" (*Leslie*, 1883, 20 S. L. R. 362). A factor is not merely one who holds a mandate to attend certain meetings (*Walker*, 1870, 8 M. 443). A factor for two proprietors whose *joint* rental exceeded £800, the separate rentals being less, was held disqualified (*Walker, supra*). A factor for trustees infeft in lands and heritages of the required amount was held qualified (*Boyd*, 1876, 14 S. L. R. 489). A person entered more than once on the roll, as proprietor and as factor, or as factor for more than one proprietor, is only entitled to one vote, though one or all of his constituents are absent, since the Acts give only a qualification, not a right of voting by proxy (*Craigie*, 1879, 7 R. 53). Commissioners *ex officiis* do not require the qualifications. A list of Commissioners *ex officiis* will be found in the last Annual Supply Act, 16 & 17 Vict. c. 111.

Claims.—The Clerk of Supply (the County Clerk, L. G. Act. 1889, s. 12 (4)) must keep open for inspection, till the 30th October in each year, a list of all such claims to be put on the Commission as have been given in to him before the 20th of the same month, and objections thereto on the part of any Commissioners must be notified in writing both to the clerk and the claimant within ten days of the first-mentioned date; and the clerk must give ten days' notice to both claimant and objector of the time (not later than 20th November) and place where a committee, appointed as after stated, meet to dispose of such claims, which must be done before 20th December in each year (20 Vict. c. 11, and 19 & 20 Vict. c. 93, s. 4), so that a list of the Commissioners, corrected to date and open to inspection, may be drawn up as conclusive evidence of their title to act and vote (19 & 20 Vict. c. 93, s. 5). The Commissioners at their annual meeting appoint a committee, of which the quorum is three, to dispose of such claims and objections (19 & 20 Vict. c. 93, s. 5). A summary appeal from the committee lies to the Lord Ordinary on the Bills, whose judgment is final (19 & 20 Vict. c. 9, s. 5). Commissioners of Supply require to take the oath of allegiance (34 & 35 Vict. c. 48, repealing 21 & 22 Vict. c. 48, and 22 Vict. c. 10).

Historical Account.—Commissioners of Supply owe their existence entirely to Statute. They were appointed by Parliament in annual Acts of Supply to levy the land tax within the county to which they belonged. Erskine (Bk. II. v. 35) says that, "By two Acts of the Usurper's Parliament, holden at Westminster, 1656, c. 14 and 25, imposing taxations upon Scotland, the rates upon the several shires are precisely fixed, and the equal assessment of those rates among the individual landowners in every shire is left to the adjustment of Commissioners." During the latter part of the reign of Charles I., a new and different mode was introduced for levying the large sums that were imposed upon the owners of land. Monthly assessments were laid on, and, in order to render the burden equal, new valuations were made by Commissioners appointed for that end, who were ordered to inquire into the just and true worth of every person's rent (Wight on *Elections*, 1784, p. 193). The Act of Convention, 1667, providing supply, ratified by 1670, c. 3, appointed Commissioners, and thereafter in each successive Act granting supply, a special body of Commissioners was appointed to carry the Act into effect. They had power to levy the land tax, and under the Act 1681, c. 3, and 1698, c. 10, might quarter soldiers on defaulters, according to the amount of the deficiency. Within burghs the magistrates were the Commissioners, and they imposed the tax by stent-masters (1597, c. 277; 1633, c. 2; and 1667). Prior to 1798, Commissioners were specially named for each county in the annual Acts of Supply; but the land tax being made perpetual in that year, the Commissioners of the previous year remained in office, additions being made to their numbers in each county from time to time to supply vacancies. Commissioners met at the head burgh of their several counties on a certain day named in each Act, and they were empowered to appoint the subsequent diets of their meeting, and to name conveners from time to time.

The old qualification of Commissioners (with the exception of official persons) was property, superiority, or liferent of lands to the extent of £100 Scots (£8, 6s. 8d.) valued rent; but by 17 & 18 Vict. c. 9, s. 19, and 19 & 20 Vict. c. 93, and 20 Vict. c. 11 (see *supra*), the qualifications of Commissioners were finally settled, and anyone possessing a qualification became a Commissioner so long as he remained qualified.

Originally the powers and duties of Commissioners were confined to assessing or levying the land tax, but during the two centuries which have elapsed since 1667 various additional duties and functions came to be imposed upon them. Thus by the Act of 1686 they were authorised to act with the justices of peace in maintaining bridges and ferries within their counties, and their duties in these matters continued until they were transferred under the General Turnpike Act, 1831. Commissioners of Supply had also the appointment of parochial schoolmasters where the heritors of any parish failed to make an election (1696, c. 26; 43 Geo. III. c. 84). This power was taken away in 1872 by 35 & 36 Vict. c. 62. The appointment of the Collector of the Land Tax lay with the Commissioners until it became vested in the Treasury by 5 & 6 Will. IV. c. 64. Previous to the Local Government Act, 1889, which almost entirely deprived the Commissioners of their importance as local administrators, they had, in addition to apportioning and settling the land tax, the following duties and functions to perform:—(*a*) Managing the general county expenditure, and levying assessments for it and a number of other purposes; (*b*) managing the county police (through a committee); (*c*) acting (through a committee) as judges of appeal under the Valuation

of Lands and Heritages Statutes; (*d*) dealing (through a committee) with claims for admission to their own body, but subject to an appeal to the Court of Session; (*e*) carrying out the provisions of the Statutes relating to the Registration of Parliamentary Voters, Lunacy, Prisons, Sale of Food and Drugs, Militia, Reformatories and Industrial Schools, and Sheriff Court Houses. The Statutes which contained the powers and duties of the Commissioners which were transferred to the County Council are as follows:—

County Finance.—31 & 32 Vict. c. 82, ss. 2, 3, and 10. *Police.*—20 & 21 Vict. c. 72. *Valuation.*—17 & 18 Vict. c. 91; 20 & 21 Vict. c. 58; 30 & 31 Vict. c. 80; 42 & 43 Vict. c. 42; 48 & 49 Vict. c. 3, s. 9, subs. 4 and 6; 48 & 49 Vict. c. 16; 49 & 50 Vict. c. 15; 50 & 51 Vict. c. 51. *Registration of Parliamentary Voters.*—24 & 25 Vict. c. 83; 48 & 49 Vict. c. 16. *Lunacy.*—20 & 21 Vict. c. 71; 25 & 26 Vict. c. 54; 40 & 41 Vict. c. 53, s. 61; 50 & 51 Vict. c. 39. *Prisons.*—40 & 41 Vict. c. 53. *Sale of Food and Drugs.*—38 & 39 Vict. c. 63; 50 & 51 Vict. c. 29. *Militia.*—17 & 18 Vict. c. 106; 23 & 24 Vict. c. 94; 35 & 36 Vict. c. 68. *Reformatories and Industrial Schools.*—40 & 41 Vict. c. 53, ss. 6 and 7; 48 & 49 Vict. c. 61. *Sheriff Court Houses.*—23 & 24 Vict. c. 79; 47 & 48 Vict. c. 102. For the powers and duties still remaining to the Commissioners, see *supra.*—[See Bell, *Prin.* 1127–9; Ersk. Bk. i. tit. 4. s. 31; Chisholm, *Justice of Peace Digest*; Rankine on *Landownership*, 177; Wight on *Elections*, 1784, p. 193.] See Land Tax.

Commissioners of Teinds.—See Teind Court.

Commitment for Trial.—See Criminal Prosecution.

Commixtion.—The mixing together of bodies or fluids into a heap or mass. In a strict sense, the mixing together of solids; as opposed to confusion, the mixing together of liquids. When the materials are mixed together a new property is created, and elaborate rules were laid down by the Roman jurists as to the ownership of the new material. If by mutual consent the materials belonging to two persons were mixed together, the mixture was their joint property, whether the mixture created a new substance or not (Just. Bk. ii. tit. 1. s. 29; *Dig.* xli. 1. 789). But if the mixture was made accidently, or by one party without consent of the other, the party who had made the mixture was bound to hand over to the other his materials, if that were possible, or, if not, to account for the value of the materials used. Or the new substance would be divided in proportion to the shares contributed, quantity and quality being taken into consideration (Just. Bk. ii. 1. 28; *Dig.* vi. 1. 4. 5). If a person used materials of another, and bestowed labour on them, thereby forming a new material, who was the owner of that new material? This question was answered differently by the Proculeians and the Sabinians. The former held that, as a new thing had been created, its maker was the owner; while the latter thought that the ownership of the materials used did not change (Gaius, Bk. ii. 79). Justinian adopted a compromise between these views, and made the distinction that if the materials employed could be restored to their primitive condition, the new article belonged to the owner of the materials. If, on the other hand, the new article could not be so restored, the manufacturer was entitled to the ownership,—as in the case of grapes

made into wine, which could not be restored to their original condition (Just. Bk. ii. 1. 283).

In the law of Scotland the rules of the Roman law are followed: (1) Goods mixed together by consent are common property, even where it is possible to separate the materials united, the shares belonging to each party being in proportion to the quantity and value of the shares belonging to him (Ersk. Bk. ii. 1. 77).

(2) Goods mixed together by accident are also common property, and are owned as above, unless it is possible to separate the commodities, in which case each party retains the materials that originally belonged to him.

(3) In the case of a new material being manufactured by the labour of one person with the materials of another or others, the rule laid down by Justinian is followed; but if the manufacturer gets the ownership of the article, the owner of the materials has a claim against him for the work he has done. It was laid down by Lord President Inglis, that where two or more persons have each contributed to the production of a new subject their materials or skill and labour, or both, they hold it as common property, in shares corresponding with the value of their respective contributions (*Wylie & Lochhead*, 1870, 8 M. 552). According to the law of England, which differs from the Roman law, if one person, without the consent of another, mixes his goods with the goods of the other, the ownership of the whole goods mixed together passes to the person who has not made the mixture. If, however, the goods continue to be distinguishable, the commixtion or confusion makes no alteration in the property. They can be separated, each party retaining what he originally had. Or if the quality of the goods is the same, and the quantities mixed together are known, the party who made the commixtion can claim his own goods back, subject to the right of the other proprietor to make good his share out of the whole mass (*Hallett*, 1880, 13 Ch. Div. 696).—[Bell, *Prin.* s. 1298; Stair, ii. 1. 41; Ersk. ii. 1. 17; Bankt. ii. 1. 15.] See Accession; Confusion.

Commodate.—A species of loan (of more importance in Roman than in Scots law), by which the borrower is bound to restore to the lender the actual subject lent. The loan is gratuitous, and is for a fixed time, or a definite use. The obligation on the borrower is to return the same individual subject which was lent, and not merely the equivalent, and that in the same condition as it was at the time of entering into the contract. In short, the obligation is to return the subject *in specie*. It follows that, as commodate consists in the use, and the use only, of a certain subject, there can be no proper contract of commodate of things consumed or destroyed in the use.

The property of the subject lent remains with the owner, the use of it being the only right competent to the borrower. Hence, if the subject lent in commodate perish, or become deteriorated (beyond ordinary tear and wear) while in the borrower's possession, and without his fault, the loss falls on the lender, in consequence of his right of property. If, however, the borrower be at fault, he must make up the loss; but he will not be liable for an accident arising from causes over which he has no control. The borrower must be exactly careful of the subject lent while it is in his possession, since he alone has the whole benefit of the contract, and the slightest fault on his part will make him responsible. Thus, where a

valuable manuscript, which had been lent by the owner, was destroyed by an accidental fire while in the possession of the borrower, it was held that the loss fell on the lender (*L. Colville*, 1693, 1 Fount. 544); but where the loss of the subject was imputable to the fault of the borrower, he was found liable in its value (*Buchanan*, 1696, 1 Fount. 712).

As the subject is lent for a certain use, or for a definite time, it is not in the power of the lender to demand it arbitrarily from the borrower, who is entitled to hold the subject until the purpose of the loan be served, or until the time limited by the contract be expired.

The ordinary expense, which is the natural equivalent for the use of the thing lent, must be borne by the borrower; but the lender is bound to pay, or refund to the borrower, any extraordinary expenses incurred in preserving the subject lent.

The contract of commodate is ended by lapse of the time fixed in the contract, by the purpose for which the subject was lent being satisfied, and by the perishing of the subject lent.

[See More's *Notes*, lxxi; Ersk. iii. 20; Stair, i. 11. 8 and 9; Bell, *Prin.* i. 159.]

Common Agent.—When several parties, having the same or similar interests in a litigation in the Court of Session, employ one agent to conduct their cause, he is called a common agent. Such an appointment was usual in actions of ranking and sale, when that form of action was in frequent use, and is competent in multiplepoindings (A. S. 11 July 1828, s. 48), but the principal occasion when a common agent is employed is the process of augmentation and locality. In this process, when the Court has granted and modified an augmentation, and when, in the usual course, the cause is remitted to the Lord Ordinary to prepare a locality and report, the judge ordains the heritors, or their agents, to meet for the purpose of naming a person as common agent for conducting the locality. No person can be appointed as common agent who is agent for the minister or any heritor in the parish (A. S. 12 Nov. 1825, s. 13). The duty of the common agent is to prepare a scheme of final locality, and to distribute copies thereof among the agents for the heritors. [As to the order of allocation, see Buchanan on *Teinds*, p. 256 *et seq.*] In preparing the scheme of locality, the common agent is required to obtain a full production of the heritors' rights to the teinds, and their decrees of valuation, if there be any, and then to prepare a state of the teinds, classifying the various rights of the heritors.

Prior to 1856, ranking and sale was the ordinary mode by which the heritable estates of insolvent debtors were realised and distributed among their creditors. It has now, however, almost gone into desuetude. Under this process the interests of the creditors were provided for by the appointment of a common agent, elected by the creditors to conduct the case and to act for their common behoof. For his duties, see A. S. 17 Jan. 1756, and A. S. 11 July 1794.

[Bell, *Com.* ii. 279; Bell, *Convey.* ii. 823; Goudy on *Bankruptcy*, 2nd ed., p. 524; Shand, *Practice*, vol. ii. p. 881; Mackay, *Manual*, p. 383 *et seq.*]

See Ranking and Sale; Multiplepoinding.

Teind Process.—The practice of appointing a common agent for the heritors was begun towards the close of last century (Connell, i. 477). From *Borthwick* case, 1795 (*Teind Records*), it appears that the agent was suggested by the heritors, and nominated by the Lord Ordinary (himself a

reporter to the Court till the passing of the Judicature Act, 1825), "for carrying on the process of locality of the pursuer's stipend, and obtaining and extracting a decree of locality therein." The expenses were afterwards decerned for by the Court and allocated on the heritors. And, as in that case, the common agent might be agent for a heritor.

Following upon The Teinds Act, 1808, the A. S. 5 July 1809, s. 5, *inter alia*, directs the Lord Ordinary to "ordain the heritors or their agents to meet for the purpose of naming a person to be suggested to the Lord Ordinary as common agent for conducting the locality," and intimation thereof to be made in certain newspapers (*Elliot*, 147–9). The appointment of agents for parties interested appears to have led to some abuse, and it was provided by A. S. 12 November 1825, s. 13, "that no person who is agent for the minister or titular, or for any heritor in the parish, shall be appointed common agent." This does not preclude the right of the titular to give in a locality, which is occasionally exercised. And where the heritors agree amongst themselves to put in a state of teinds, a common agent is dispensed with, and a remit is made thereupon to the clerk to prepare the locality.

In a competition for the office, the agent supported by the largest rental is appointed common agent. The proven rental, and not the teindable rental, regulates the election (*Barony*, 12 July 1866, 38 Jur. 542). And where the rental had been borrowed up and lost, the Lord Ordinary, on report of the clerk as to the person supported by the largest rental, appointed the common agent (*Quothquan*, 20 July 1888).

In the interlocutor confirming the common agent, his duties are stated to be: "for conducting the locality of the pursuer's stipend, and for obtaining and extracting interim and final decrees therein at the expense of the heritors in proportion to their several teind rentals in the parish, as the same shall be ascertained in the course of the process." And when the business is closed, his account is taxed by the Auditor, decerned for by the Lord Ordinary, and allocated by the clerk.

Numerous important questions have been decided on closed records between heritors and common agents (see Brown's *Synopsis and Subsequent Digests*). After the case has been disposed of by the Lord Ordinary, it may be reviewed by a Division of the Court on reclaiming note (A. S. 1825, s. 16). But the Court have indicated that it was not the duty of the common agent to take an interlocutor to review unless the interests of the heritors generally are affected (*St. Boswells*, 18 July 1865, 27 Jur. 583). And he is not entitled to proceed with a valuation (*St. Cuthberts*, 3 December 1857, 20 D. 190). The consent of a common agent binds the body of heritors (H. of L., affirming Court of Session in *Earl of Hopetoun*, 27 March 1846, 1 D. 685; and *Inveresk*, 10 Nov. 1868, 7 M. 95). He is liable in expenses, with right of relief (*Kilmalcolm*, 14 Dec. 1833, 6 Jur. 132). And found entitled to interim decree for expenses (*Barony*, 11 Feb. 1871, 43 Jur. 240).

Common Debtor.—See ARRESTMENT.

Common Gable.—The doctrine of common or mutual gable is the effort of the law to adjust the rights of conterminous proprietors in the partition wall dividing their houses. It was part of the great legal heritage which descended to Scotland, among other nations, from Rome. Nor was it

unwelcome, since, by its adoption, the necessity for two division walls, each fit to fill the part of a gable, *i.e.* support beams and contain fireplaces and their vents, was avoided.

The goal to be attained was to approximate the rule of law to such an expedient as would be adopted by an owner building on two of his building lots adjoining one another at the same time, or to that used by two neighbouring proprietors building each on his own ground, but on terms adjusted for their mutual advantage. The result is, that an owner of a lot, sold or feued for the purpose of building a continuous street, may, in erecting his tenement, construct his gable one-half upon the solum of the adjoining lot, so as to be a mutual gable; and when such gables are used by the neighbouring proprietors, they are bound to pay their share, which is one-half of the cost of construction, to the first builder. In general, the original builder may use his neighbour's wall in this way without his express consent, acting on an implied contract contained in a feuing-plan of the street, or to be deduced from the special circumstances of the case (L. P. Inglis, *Lamont*, 1875, 2 R. 784, 787). The custom of all burghs also infers a contract (*supra, loc. cit.*). In the judgments given in this most instructive case, it is laid down that a later builder may make such alterations, in consonance with the natural uses of the subject, and without injury to his neighbour's rights, as may be necessary to his enjoyment of it, *e.g.* slapping-out vents and fireplaces, laying joists, and even heightening the gable; but to what extent this latter may be done is a question of circumstances. The gable must not be divorced from its natural uses, as by the striking-out of wall-presses (see opinion of late Lord Deas in above case). A gable and a division wall are widely different; so the latter may not be turned into the former without consent, nor will an owner who has suffered such an infringement of his rights be liable in damages if he timeously return it to its former condition (*Watson*, 1880, 14 Ch. Div. 192).

In *Begg* (1874, 1 R. 366), the owner of ground in the suburbs of Edinburgh, pending negotiations, which were futile, without obtaining consent from the adjoining proprietors, turned a mere division wall into a gable. Application was made for an order on the builder to restore in integrum, and for interim interdict, which was refused as not having been timeously brought. The conterminous owners then sought to have the wall in dispute declared mutual; that change thereof without their consent was illegal, and that it should be restored to its former height. The Court, exercising equitable powers vested in them (on which exercise Lord Watson animadverts in *Grahame*, 1882, 9 R. (H. L.) 91, 92), held that in the special circumstances the gable need not be returned to its former use, and that defender's offer to build it at his own expense was recompense for use of the land without consent (*Jack*, 1875, 3 R. 35). In the case of *Wallace* (1808, M. App. Personal and Real, No. 4), it was settled that an owner of a building-stance, taken bound by his superior to erect mutual gable, with relief against his neighbour on the latter's making use of it, is entitled to be preferred to the amount of such relief upon the price of the property adjoining, in the event of his neighbour's bankruptcy. It has also been decided (*Hunter*, 1846, 8 D. 787) that the right to claim a share of the expense of a mutual gable from the adjoining proprietor was real, and passed by a conveyance of the tenement, as it stood, without any special mention of it. A later builder, who erects a house lower than that of the first, is liable in half the cost of the gable, notwithstanding any custom of burgh (*Ness*, 1825, 4 S. 7). In the case of *Mackenzie* (1829, 8 S. 74), a mere claim for the value of one half a mutual gable embodied in a feu-right, without any

corresponding obligation to pay it, would not have given the pursuer a right of relief had the defender not signed as consenter. In the case of two feus, on one of which the owner had built a mutual gable, and, after both had passed into the hands of singular successors, the second stance had been built on, it was held (1) that gable might be built half on the solum of next feu; (2) that right of relief inhered in the subjects and was real right, and so good to and against singular successors; that though the right to recompense was co-existent with the gable, it was only exigible when that was utilised (*Law*, 1855, 18 D. 125). It makes no difference that the gable was built when both stances belonged to the same proprietor, so long as there is no discharge of the inherent claim in the title of the purchaser of the house already erected: and this claim will hold good, whether the vacant stance be retained by the original owner or conveyed to a third party (*Glasgow Royal Infirmary*, 1877, 4 R. 894). Mere constructive use is not sufficient to infer against the user a claim for relief (*Sinclair*, 1882, 10 R. 45). *E. Moray*, 1858, 21 D. 33, decides that a superior giving out a feu which has been reconveyed to him by the original grantee after the latter has paid for his half of the gable, cannot sue the later grantee for the price without a reservation in his feu-right. This case also affords valuable opinions by the Court at what precise period a *pro indiviso* real right arises. For a statement of the relative rights of parties in a gable, accepted as law at present, see Ld. Rutherfurd Clark's opinion in *Robertson*, 1886, 13 R. 1127, 1132. As to whether scarcement or actual gable is boundary, see *Houston*, 1894, 21 R. 923. Gable built entirely on solum belonging to builder, not mutual; and as to effect of mora and acquiescence—*Fraser*, 1895, 22 R. 558. From the fact that compulsory division is unsuitable owing to the character of the subject, and that the doctrine *in re communi melior est conditio prohibentis* applies only where the contemplated alterations will be improper or hurtful, it may be seen that the distinction between common property and common gable is a wide one.

The various rules governing the diverse cases of gables in flatted houses may be briefly noticed. In the case of an owner of a tenement built against a tenement owned in flats, the former has common property with each owner of the latter, in proportion to their various shares: and they have among themselves common interest in such portions as they do not own. A difference occurs in the case of two contiguous flatted houses, for there a common ownership exists between owners of contiguous flats to the same extent that the gables are the boundary of such flats, and each owner in the one house has a common interest in the portion of the gable on his own side, and owners on each side of the gable have cross rights of common interest *inter se*. (See Rankine, *Landownership*, article on "Common Interest," 3rd ed., p. 588.)

[Rankine, *Landownership*; and *Law and Practice of the Dean of Guild Court*, by J. Campbell Irons.]

Common Good.—The common good of a burgh consists of the entire property of the burgh, which is held by the corporation for behoof of the community. In ancient times it was composed of lands granted by the Crown, of the fines or impositions known as the issues of Court, and of taxes or imports on trade, levied as tolls, petty customs, or dues. The common good has been generally distinguished by being considered either as alienable and liable for the payment of debts, or inalienable and not

subject to encumbrance. That part of the property which can be sold consists of lands, houses, mills, fishings, feu-duties, and other descriptions of heritage, which are generally situated within the royalty or in its immediate neighbourhood. The lands, mills, and fishings are usually let for the periods and under the conditions common to the district, while houses, according to ordinary practice in towns, are let for a year, or sometimes for a longer period where a higher rent can be obtained. The property dedicated by grant, Statute, or otherwise to the special use and behoof of the burgh is considered to be inalienable. This class of property usually consists of public lands or buildings, such as churches, town halls, market places, and common greens or grounds set apart for the general use or enjoyment of the inhabitants. These are considered to be held by the corporation in trust for behoof of the community, and that the members of the corporation are bound to hold and apply them only as trustees for behoof of the inhabitants. The revenues arising from these different kinds of property, including the customs, casualties, entry-money of burgesses, etc., fall into and form part of the common good.

These grants or privileges were bestowed upon the burghs partly for the purpose of enabling them to bear their proportion of the burdens of the Crown, and to enable them to discharge their local, public, and municipal duties. Accordingly, the Crown for some time continued to keep a watch over the administration of their affairs, and the magistrates had to account periodically to the Great Chamberlain with reference thereto. During the reign of King James I. this officer was superseded as public accountant by the Lord High Treasurer. Though his powers were much the same as the chamberlain's, the same vigilant care was not exercised in the administration of the affairs of the burghs, with the result that the burghs neglected to apply their properties to the proper purposes, and many abuses crept in. The progress of mismanagement was very marked and rapid; and although during the fifteenth and sixteenth centuries many Statutes were passed to check this, they proved practically inefficient. The improvident and pernicious mismanagement and mal-administration of the burgh affairs in Scotland had gone on to such an extent, that during the reign of Charles II. fears were entertained that Scotland would not be able to bear the burdens, either imperial or local, to which it was liable. Accordingly, in the year 1662, the Lord High Treasurer was instructed, along with the auditors, to examine the royal burghs, and call them to account for spending their common good. This likewise seems to have been ineffectual, for in 1684 a special commission was issued under the Great Seal, directing the Lord High Treasurer and Treasurer-Depute to summon all magistrates of royal burghs and their representatives from 1660, and to institute an accounting as to the application of the common good during the preceding period of twenty-four years, making them personally liable for such sums of money as should appear to have been unduly or profusely expended. During the sixteenth and seventeenth centuries other proceedings of a similar nature were resorted to, to check the abuses, and Acts of Parliament, commissions of the Convention of Burghs, and suits in the Court of Session, were all tried, but with very indifferent success. At last, in the beginning of the eighteenth century, a suit raised in the Court of Session, charging gross mismanagement of burgh property against the magistrates of a burgh, and asking to have them ordained to bring certain specified sums to the credit of the burgh, and to enter into a general accounting with regard to the whole of their intromissions, resulted in the judgment that questions concerning the management of the common good and revenues of royal burghs were

incompetent before the Court of Session, except so far as brought under the Act 1693, and that burgesses had no title to complain of acts of mismanagement on the part of the magistrates which do not directly affect their private and patrimonial rights. This judgment was felt to reveal a state of matters which called for further statutory remedy; and accordingly, on 29th July 1822, the Act 3 Geo. IV. c. 91, commonly known as Sir William Rae's Act, was passed. The object of this Statute is to regulate the administration of the affairs of burghs royal, both in their municipal character and as trustees of charities under their administration. It stipulates that a particular account of the common good and revenues of every royal burgh, under specific heads, specifying also the debts due by the burgh, and each branch of revenue, shall be made up to the date preceding the annual election of magistrates, and shall remain open for inspection during three months after their election. Burgesses are empowered to state objections to the state in writing, and to call for exhibition of vouchers. If not satisfied, any three burgesses may, within three calendar months of the expiration of the thirty days, complain in writing to the Court of Session, who are required to determine the matter in a similar way. Alienations and leases are only to be made by auction after public notice, and no such notice can be given till an Act of Council has been passed specifying the particulars. The magistrates and council are not to contract debts or grant obligations without previous Act of Council; and if they do so, such debts and obligations are void as against the common good, reserving the personal liability of the parties contracting. In the event of the annual accounts stipulated for not being made out and deposited in conformity with the Act, the provost, magistrates, and council are liable to a penalty not exceeding £50 each, to be recovered, with costs, upon the information of three or more burgesses to the Court of Session, one half of the penalty to go to the common good and the other half to the burgesses suing, or as the Court may direct. This was followed by the Act 3 & 4 Will. IV. c. 76, s. 32, which enacts that on or before 15th October in each year, the magistrates and council of every royal burgh shall make up a distinct state of their affairs, subscribed by the chief or senior magistrate, town clerk, and treasurer, containing an account of all the funds, properties, and revenues in their administration, and all their transactions in relation to such since they came into office. This account must be brought down as nearly as may be to 15th October, and kept in the town clerk's or treasurer's office for the inspection of the registered electors from that date till the election. A full and distinct abstract of the account, with a balance-sheet containing all necessary particulars, must be printed and published by the magistrates on or before 20th October annually. By the 36th clause of this Act, only such laws, Statutes, and usages as are inconsistent with its provisions are repealed, so that the requirements of the Act 1693, c. 45, and 3 Geo. IV. c. 91, are still operative in so far as not inconsistent with 3 & 4 Will. IV. c. 76.

The Court has frequently restrained magistrates from alienating any part of the common good which is considered inalienable. Thus it has been held that no building could be erected on the streets (*Mays. of Montrose*, 1762, Mor. 13175), that the magistrates could not feu a part of the street (*Young*, 2 Feb. 1816, F. C. 75), nor sell the patronage of a church forming part of the common good of the burgh (*Wallace*, 27 Feb. 1824, 2 S. 758), nor feu ground which has been reserved for the common use of the inhabitants for bleaching clothes and the sport of golf (see also

Graham, 19 June 1879, 6 R. 1066; *Kelly*, 1812, referred to by Lord Cunningham; *Home*, 18 Dec. 1846, 9 D. 293), nor apply part of a similar public ground (Glasgow Green; but see *Paterson*, 27 July 1881, 8 R. (H. L.) 117) to widen a street (*Adams*, 10 June 1868, 40 Jur. 524), nor take down the steeple of the property of a burgh without judicial authority (*Campbell*, 1870, 8 M. (H. L.) 31), nor deprive gardeners of their right to hold fairs and markets on ground assigned for that purpose (*Blackie*, 20 Mar. 1884, 11 R. 783; *Murray*, 1892, 20 R. 908), nor can a creditor sell the jail and town house with its steeple and bell, or the petty customs of a royal burgh (*Phin*, 1827, 5 S. 690), nor a right of fishing belonging to the individual inhabitants of a burgh which had never been a source of patrimonial gain (*Beck*, 10 July 1839). It has also been held that the petty customs leviable by the magistrates are not liable for the debts of the burgh, but ought to be applied exclusively in defraying its proper municipal expenses (*Mags. of Lochmaben*, 16 Nov. 1841, 4 D. 16); that neither the petty customs nor the rent payable by the tacksmen thereof can be alienated or attached by creditors, and that there is no distinction between the right to levy and the customs levied, nor between the customs necessary for the maintenance of the public office and the surplus not required for that purpose, the measure of what is necessary being the extent of the grant itself (*Kerr*, 14 Jan. 1865, 3 Macq. 370).

On the other hand, the magistrates may feu, sell, or lease for adequate consideration the common good, in so far as not destined to specific purpose, provided this be clearly beneficial to the burgh. The feuing, alienation, or leasing for more than a year, however, must be conducted by public roup, in terms of 3 Geo. IV. c. 91. This ensures that the consideration will be publicly indicated, which ought always to be the case in burghal transactions. Where reduction was sought of a feu and tack of Leith Links for two periods of nineteen years, on the ground of these being alienations of the common good granted for an inadequate consideration and not by public roup, the Court repelled the reasons, but afterwards allowed a proof before answer, indicating that if the reasons were sufficient the reduction would succeed (*Mags. of Edinburgh*, 1 Feb. 1690, Mor. 2496; see also *M'Ghie*, 16 Dec. 1735, Mor. 2501). It has been held that the magistrates are entitled to sell a superiority forming part of the common good and apply the price in payment of debt (*M'Dowell*, 18 Nov. 1768, Mor. 2525); but a previous Act of Council would undoubtedly be needed for such a sale, as it has been to authorise a feu of burgh property (*Mags. of Selkirk*, 11 June 1828, 6 S. 955), and it cannot be done privately (*Stewart*, 22 Jan. 1822, 1 S. 261).

Keeping in view the law applicable to trustees, the magistrates may grant bonds affecting the burgh and its funds for proper public purposes, for which neither the granters nor their heirs are liable personally, but which transmit against their successors and the community (*Bank.* B. ii. tit. 19. s. 2; *Boyne*, 15 Feb. 1695, Fount.; *Burgh of Renfrew*, 2 June 1892, 19 R. 822). The magistrates and council cannot discharge a bond granted to the burgh without payment of the sum or adequate consideration (*Mags. of Glasgow*, 1685, Mor. 2515). If a debt be contracted without a previous Act of Council setting forth the cause of incurring, the magistrates who signed the bond must relieve the burgh, unless they can show that the money was applied for the burgh (*Ross*, 13 Feb. 1711, M. 2499; *Archbishop of St. Andrews*, 24 Nov. 1685, M. 2496; see also *Honieman* and other cases cited in Marwick, p. 380).

Burgesses of royal burghs are not entitled to challenge judicially the administration by the corporation of the affairs of the burgh, or bring the magistrates and council into a general accounting regarding these. This is well settled by a long train of old decisions. Nor has the remedy intended to be provided by the Act 3 Geo. IV. c. 91, been much more effectual in providing a check on maladministration. However well intended, it is now unquestionable that the provisions of this Act have proved nearly useless. There have been six different suits under it, in three of which the burgesses failed, in one they were successful, and in two others the proceedings were not brought to a conclusion (*Report, Municipal Corporations*, vol. i. p. 30).

Burgesses may, however, sue the magistrates and council for the vindication of their individual patrimonial rights, and to prevent specific acts of mal-administration of the property of the burgh or its revenues (*Johnston*, 23 July, 1735, Elchies, *voce* Burgh Royal, No. 4; see also *Mags. of Lauder*, 17 May 1821, 1 S. 17, and cases there cited; *Keiller*, 7 Dec. 1886, 14 R. p. 191). The magistrates and council are, however, not only entitled but bound to continue to contribute annual payments out of the common good for a burgh school, which they had been in the habit of making for a long series of years, notwithstanding the passing of the Education Act (*School Board of Greenock*, 19 June 1890, 17 R. 969).

A minority of a town council may challenge an act of the council either alienating or acquiring property, or in regard to the administration of the public property, on the ground either that the council is exceeding its powers, or that what is proposed to be done is plainly against the interests of the community which the council represents. There must, however, be clear excess of power, as the Court will not lightly interfere with the discretion of the magistrates and council (*Baxter*, 1772, Bro. Supp. *voce* Title to Pursue, vol. v. p. 629; *Aitchison*, 4 Feb. 1836, 14 S. 421, 11 F. 349; *Nicol*, 20 Dec. 1870, 9 Macq. 306).

So likewise the magistrates and council of a burgh, on similar grounds, may competently challenge the acts of their predecessors, in so far as these irregularly alienate or affect the common good, or incur liabilities on the burgh or community (*Mags. of Glasgow*, 1688, Mor. 2515; *Mags. of Pittenweem*, 1774, Mor. 2527; *Mags. of Selkirk*, 11 June 1828, 6 S. 955).

As already stated, the magistrates and council are merely trustees holding the common good and property of the burgh in trust for behoof of the corporation, and are only entitled to alienate or acquire it for the purposes of the trust. These purposes are public objects within the scope of municipal administration; and while the Court will allow a fair discretion in the administration of the corporation funds, it has insisted that what is done must be done unequivocally for the benefit of the burgh as a whole, and not for any particular part or limited class of persons. The primary purposes of this trust are only what can be fairly classed under municipal administration, and it is very doubtful how far expenditure beyond this would be justified. In England, it has been held that the purchase of a gold chain was an illegal expenditure of the burgh funds which could not be sustained (*Attorney-General*, 18 Mar. 1872, 26 L. T. (N. S.) 392). Probably a similar judgment would be pronounced if such a proceeding were challenged in Scotland, and magistrates and councillors cannot be too careful in limiting their administration of the common good strictly to its proper purpose, lest, on a competent challenge, they may find themselves ordained to restore what they may have, from their point of view, innocently misapplied.

Common Interest.—"A species of right differing from common property takes place among the owners of subjects possessed in separate portions, but still united by their common interest. It is recognised in law as *common interest*" (Bell, *Prin.* 1086). The term is sometimes used in connection with the common right and interest of proprietors of land in running water which flows through their lands, or which would do so unless wrongfully intercepted by upper proprietors; but since running water cannot be possessed in "separate portions," the above definition does not entirely apply to the rights in it. The term common interest is, however, peculiarly applicable to the rights of proprietors of different flats or dwelling-houses, contained in a single building, with possibly different entrances, but under one roof, and contained between the same gables and walls, over every part of the building other than the flat of which they are proprietors. Such buildings have long been technically known in Scotland as "lands," or "tenements of lands," and the use of the phrase "common interest" now applies exclusively to the law of the tenement. The right of the proprietor of one flat over the remainder of the building, or over a neighbour's flat, arising through common interest, is not a right of property. His only right of property in the building is confined to his own flat. Neither is it a right of "common property," though the stairs and passages of such a building are, failing anything special in the titles, the common property of all the proprietors. It is something more complicated than a servitude, as entitling each proprietor to insist on the performance of certain acts. In short, his rights arise from the "common interest" which he, together with the proprietors of other flats, has in the upkeep of the component parts of the building which do not immediately belong to him, as directly or indirectly affecting the individual portion of which he is the proprietor. The general principles of the law of the tenement are laid down by Lord Stair (ii. 7. 6) thus: "When divers owners have parts of the same tenement, it cannot be said to be a perfect division, because the roof remaineth roof to both, and the ground supporteth both; and therefore, by the nature of communion, there are mutual obligations upon both, viz. that the owner of the lower tenement must uphold his tenement as a foundation to the upper, and the owner of the upper tenement must uphold his tenement as a roof and a cover to the lower; both which, though they have the resemblance of servitudes, and pass with the thing to singular successors, yet they are rather personal obligations, such as pass in communion even to the singular successors of either party."

This statement of the law of the tenement has been the foundation on which the decisions on the subject have proceeded; but it must be borne in mind that the rights of the proprietors of "lands" are ruled, in the first place, by their titles; and from the original titles, and the possession that has followed thereon, the "law of the tenement" is deduced, while it is only failing specialities in the titles that the rules of common interest are applied (*Gellatly*, 1863, 1 M. 592). Any obligation beyond those recognised as being implied by the common interest of the proprietors must be repeated in the titles of the singular successor against whom it is alleged (*Nicolson*, 1708, Mor. 14516). As a rule, the part of the solum on which the common stair or passage communicating with the several dwelling-houses rests, is the common property of the proprietors. With this exception, the owner or owners of the lowest floor are proprietors of that part of the solum which their flats cover, and the portions of the front and back area adjacent thereto, subject to the common interest of the upper proprietors, who can

only object to such operations on the solum as might be injurious to the upper flats (*Stewart*, 1829, 7 S. 362), and cannot prevent the proprietor of the solum converting his dwelling into shops, and building over the front and back area, even though the upper proprietors had in their titles a right in common to the area (*Johnston*, 1877, 4 R. 721). Loss of amenity by the upper proprietors gives no good title to object to such alteration (*Barclay*, 1880, 7 R. 792, and *Calder*, 1886, 13 R. 623). Where the lowest proprietor has, by his titles, only a joint ownership in the solum together with the upper proprietors, they have a good title to object to such alterations (*Sutherland*, 1887, 15 R. 62; *Turner*, 1890, 17 R. 494). The proprietor of an upper flat is not entitled to rest any projecting building on the top of a building erected by the lowest proprietor on the area (*Stewart*, 1829, 7 S. 362; and see *Gellatly*, *supra*); but the lower proprietor cannot object to a projection which does not rest on his building, unless he can instruct injury (*Urquhart*, 1853, 16 D. 307). Although prevented by title from building over the front area, the lowest proprietor may yet build over the back green (*Boswall*, 1881, 8 R. 986), unless the upper proprietors have a joint right of property in or servitude over the back green (*Taylor's Trustees*, 1896, 33 S. L. R. 707). Similarly, the owner of the uppermost storey is proprietor of the roof (Ld. Deas in *Taylor*, 1872, 11 M. 25), but is bound to upkeep it in the common interest of the other proprietors. He may make alterations in the roof, if not injurious to the other proprietors (*Taylor*); but he may not add another storey to the building without consent (*Sharp*, 1800, M. App. Property, No. 3; *Watt*, 1891, 18 R. 766). A proprietor of an intermediate flat has the sole property of the space within his flat, together with sole property in such walls (other than common gables) which he does not possess in common with his neighbours laterally. The Court will allow him to make any alterations which are not productive of danger to the other flats, at sight of a reporter (*Dennistoun*, 1824, 2 S. 784); but the onus of proving no danger rests on him (*Gray* v. *Greig*, 1825, 4 S. 104; *Murray* v. *Gullan*, 1825, 3 S. 639; *Brown*, 1841, 3 D. 1205); and the comfort and amenity of the other proprietors must be considered (*Johnston*, *supra*); and he must repair any damage done without regard to expense (*M'Nair*, 1826, 4 S. 546). What constitutes danger is illustrated in *Hall*, 1698, M. 12775: *Fergusson*, 12 Nov. 1816, F. C.; *Pirnie*, 5 June 1819, F. C.; *M'Kean*, 1823, 2 S. 480. A proprietor of a flat can make no alterations in any wall of which he has not sole property without consent (*Hall*, 1698, M. 12775; *Walker*, 1797, Hume, 512; *Graham*, 1838, 1 D. 171; *Taylor*, 1872, 11 M. 25). But a right to deal with the wall of another in a certain way may be set up by prescription (*Munro*, 1821, 1 S. 172). Whether the rights of proprietors of a tenement in the common gable arise from common interest or common property, was questioned in *Gellatly* (Ld. Cowan, p. 599); but the principles of common interest were held to apply (L. J. C. Inglis, p. 599), and this is now settled (*Todd*, 1894, 22 R. 172; *Morris*, 1864, 2 M. 1089). The floors and ceilings of flats are common property between the upper and lower proprietor; and the ordinary rules applicable to common gables would apply to proposed alterations in them, subject to the common interest of all the proprietors in the tenement in the beams or supports. The common stairs are the common property of all the proprietors, with right of access thereto (*Anderson*, 1831, 9 S. 564; *Sandy*, 1823, 2 S. 195; *Taylor*, *supra*); and so are the walls and passages, and no operations can be performed on them without consent (*Anderson*, 1799, M. 12831; *Reid*, 1799, M. App. *voce* Property, No. 1; see also *Graham*,

1838, 1 D. 171; *Ritchie*, 1833, 11 S. 771; and *Gellatly, supra*). For cases of rebuilding a tenement, and the protection of the common interest as existing, see *Stewart, supra*; *Young*, 1831, 9 S. 500; and *Murray*, 1715, M. 14521.

(Rankine, 544; Ersk. ii. 9. 11; Bell, *Prin.* 1086). See also Common Property; Dean of Guild.

Common Law.—In modern Scottish use the term common law is employed in contradistinction to Statute law, as, for example, in bankruptcy questions, in the alternative remedies of reductions at common law or under ancient Statutes of gifts by insolvent debtors, or of preferences to creditors. Common law, as thus understood, is the body of custom which regulates the life and transactions of men in the land. It is derived from various sources, written and unwritten: ancient and immemorial usages—family, tribal, or national; the Roman law, civil and canon; feudal customs; and the customs or usages of other States: and it is defined and expressed by enactments of the Legislature, or, more largely, by decisions of the Court (see Stair, *Inst.* i. 1. 16; Bankt. i. p. 24, s. 59, p. 28, s. 74; Ersk. *Inst.* i. 1. 30; *Prin.* i. 1. 16, 17; Lorimer's *Handbook*, ss. 1–4; *Inst.* p. 539).

At an early stage of Scottish history the term was, apparently, sometimes used to designate only the Roman law, which was then the common law of Christendom—either the civil law by itself or in conjunction with the canon law. Thus in the Statute 1585, c. 18, provision is made for the guardianship of imbecile and insane persons by the *agnati* of the civil law, "according to the disposition of the commoun law"; and the recognition of the Roman law, civil and canon, as the common law for Scotland, in contradistinction to the Statute law, seems to be expressed also in the Acts 1540, c. 80; 1551, c. 22: see also 1587, c. 31. But Lord Stair denies that even the Roman civil law was acknowledged "as a law binding for its authority," and as the civil law of Scotland (*Inst.* i. 1. 12, 16); and Erskine, while recognising the occasional use of the term in the Statutes as equivalent to the Roman law, holds substantially the same view (*Inst.* i. 1. 28, 41). The Roman civil law was, however, in the view of Stair and Erskine, one of the main sources of Scottish legal principle and practice; and it is still—as Erskine wrote for his day—"of great weight in all cases not fixed by Statute or custom, and in which the genius of our law will suffer us to apply it." (So also Bankt. i. p. 19, s. 42).

The distinction between common law and equity, familiar in English legal history, and till recently in force in England, is not known in Scottish practice and theory (Mackay, *Manual of Practice*, p. 81, s. 13). The institutional writers expressly found custom and customary law on equity. So Lord Stair, in early times, speaking of our customs, says: "they have arisen mainly from equity" (*Inst.* i. 1. 16), and, in recent days, Professor Lorimer states as the groundwork of our legal arrangements "the customs which spring from the notions of right and wrong of a rude and simple community" (*Handbook*, s. 1). In agreement with this view, our Courts, superior and inferior, administer together law and equity (Mackay, *supra*; see Kames, *Princ. of Equity*, i. pp. 7, 27–30). Language is indeed occasionally found in early Statutes which suggests a distinction, for instance, in the Act 1540, c. 69, the words "conforme to the common law, gude equitie, and reason"; but such ambiguous phrases fall to be interpreted rather as identifying than as contrasting.

Common Lodging-houses.—By the Public Health (Scotland) Act, 1867 (30 & 31 Vict. c. 101), the duty of regulating common lodging-houses is imposed upon the local authorities under that Act. These authorities are: (1) in burghs, the town council or police commissioners; (2) in counties, the district committee (s. 5; Local Government Act, 1889, s. 11). The provisions of the Act, here summarised, are imperative upon all local authorities, even in a burgh which has power under a local Police Act for regulating common lodging-houses (*M'Phee*, 1881, 4 Coup. 424).

A common lodging-house is defined as "a house or part thereof where lodgers are housed at an amount not exceeding fourpence per night for each person, whether the same be payable nightly or weekly, or at any period not longer than a fortnight, or where the house is licensed to lodge more than twelve persons" (s. 3). The local authority, with consent of the Local Government Board, may raise the charge to sixpence (s. 59).

A register containing the names and residences of every keeper of a common lodging-house is to be kept by the local authority, who may refuse to register an applicant failing to produce a certificate of character signed by three inhabitant householders of the parish, paying poor-rates; such register must show the number of lodgers authorised to be kept (s. 59). The resolution of the local authority constitutes registration, although no entry is made in the register, and is a good defence against a complaint for keeping an unlicensed lodging-house (*Coles*, 1884, 52 L. T. (N. S.) 358). Where a person is once licensed, the local authority have no power to cancel the licence, except for the reasons set forth in the Act (*Blake*, 1887, 52 J. P. 263). Where a licence-holder cut off two of his licensed rooms and let them to a monthly tenant, opinions were expressed that he was entitled to do so, but that the local authority might have cancelled his licence (*Gunn*, 15 R. (J. C.) 57).

No house (not being a licensed victualling house) may be kept as a common lodging-house unless approved by the inspector, and registered. Contravention of this provision is an offence (s. 60).

Certified copies of entries in the register are to be received as evidence; and such copies must be furnished to any person applying (s. 61).

Rules for the well ordering of common lodging-houses may be made by the local authority, subject to confirmation by the Local Government Board; and fines imposed for breach thereof, not exceeding £5 for each offence, and 40 shillings for each day of continuance after written notice. Advertisement must be made a month prior to applying for such confirmation; and a copy of the proposed rules supplied to every person paying poor-rates who makes application (s. 62). A complaint for a breach of such bye-laws is irrelevant unless it sets forth the Act under which they are made (*Hastie*, 22 R. (J. C.) 18). The rules, when confirmed, must be hung up in the office of the local authority, and supplied to every licence-holder, who must exhibit them in every room occupied by lodgers. Copies must be furnished on application, and are to be received as evidence (s. 63). The local authority may require the owner or keeper of a common lodging-house to provide a proper supply of water therefor, where that can be obtained at a reasonable rate, under pain of removal from the register (s. 64). They may require a daily report of all persons resorting to the house (s. 65). They may remove any person suffering from infectious or contagious disease to a hospital, on a medical certificate; and may cause all bedding, etc., to be disinfected or destroyed, and pay compensation therefor (s. 66).

A licence-holder must give notice of infectious or contagious disease occurring in his house to the medical officer, inspector, or inspector of poor,

who must report to the local authority and medical officer, and the latter must visit the case (s. 67). (Where the Infectious Disease (Notification) Act has been adopted, the notice should be sent to the medical officer.)

Free access must be given to all parts of the house when required by an officer of the local authority (s. 68). A room in a common lodging-house which is not registered as part thereof is subject to inspection, and the keeper may be convicted of refusing access to the inspector (*Gunn*, 15 R. (J. C.) 57).

Every part of a common lodging-house must be kept thoroughly cleansed, including privies, drains, etc., to the inspector's satisfaction; and the walls and ceilings must be limewashed in April and October, and at such other times as the local authority may direct (s. 69). Where a licence-holder is convicted of a third or subsequent offence under the Act, the sentence may debar him, for a period not exceeding five years, from keeping a common lodging-house, without the licence of the local authority, which they may withhold, or grant on such terms as they think fit (s. 70).

The penalty for contravention of any provision of the Act, including any regulations made by the Local Government Board, may be £5 (s. 114); the procedure to be followed in prosecuting offences and recovering penalties is that prescribed by the Summary Jurisdiction Acts, 1864 and 1881, which supersedes the provisions of the Public Health Act.

The following Statutes may be noticed in reference to this subject:—The Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112, s. 10), which imposes a penalty upon any lodging-house keeper harbouring thieves or reputed thieves; The Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), which enables local authorities to provide and manage lodging-houses; The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), whereby a local authority whose district includes a seaport may, with the approval of the Board of Trade, make bye-laws relating to seamen's lodging-houses in their district, for the licensing, inspection, and sanitary condition thereof. —[Skelton, *Handbook of Public Health*; Dykes and Stuart, *Manual of Public Health*; 30 & 31 Vict. c. 101; 52 & 53 Vict. c. 50.]

Common Pasturage.—The right of pasturage, as a right separable from ownership, is a positive servitude, to which the epithet "common" is usually applied, owing to the circumstance that the locality where the right was of old exercised was almost invariably outfield land, not cultivated, but grazed in common by two or more persons, who were either owners of the land depastured in *commonty* (*q.v.*), or mere servitude holders. Both rights differ from the conventional or Statute-guarded right of crofters to feed their bestial on the land of their landlord situated outside of their crofts—a right which presupposes no ownership as vested in its holder. The servitude is no longer of practical moment, commonties having been in most cases divided up into properties held in severalty. It entitles the owner of the dominant tenement to pasture on the servient tenement at the proper season, such bestial, at the most, as the dominant tenement can fodder during winter. In case of dispute, the number and nature of the stock to be benefited are determined in an action of *souming* and *rouming*, which fixes the feeding capacity of the servient tenement (its *soum*), and the proportion of stock that may be lawfully sent to the pasture by each dominant tenement (*roum*) interested in it. The holder of the servitude cannot prevent the landowner from "riving out" the soil in tillage, if enough grass be demonstrably left for all lawful requirements, or

from working minerals or quarrying. The servitude gives no right to the game. The right may be instructed, like other positive servitudes, by express grant; by the uncurtailed positive prescription, proceeding on a title to the alleged dominant tenement either with or without reference to pasturage or to pertinents; and perhaps by grant implied on severance of the ownership of the two tenements involved. See SERVITUDE. The main difficulty in construing express words is to discriminate between such as convey the servitude only, and such as carry the more extensive right of commonty. See COMMONTY. The authorities, which are all ancient, are collected in Stair, ii. 7. 14; Ersk. ii. 9. 14.; Bankt. ii. 7. 32; Rankine, *Landownership*, p. 397.

Common Property.—"Common property is a right of ownership vested *pro indiviso* in two or more persons, all being equally entitled to enjoy the uses and services derivable from the subject; and the consent of all being requisite in the management, alteration, or disposal of the subject" (Bell, *Prin.* 1072). There may be a joint or conjunct right, or a right of common property simply. Heirs-portioners are not joint proprietors, but, as their name imports, part owners or portioners. They hold *pro indiviso* while the subject is undivided. But each has a title in herself to her own part or share, which she can alienate or burden by her own separate act. "The condition of two joint proprietors in the fee is very different: they have no separate estates, but only one estate vested in both, not merely *pro indiviso* in respect of possession, but altogether *pro indiviso* in respect of right (*Cargills*, 1837, 15 S. 408, per Ld. Monereiff, Lord Ordinary, adopted by Lord Justice-Clerk; *M'Neight*, 1843, 6 D. 128–36; *White*, 1888, 13 App. Ca. 263.

Management.—While subjects are held as common property, the general principle in regard to management is *melior est conditio prohibentis*. Each joint proprietor has a negative vote in acts that are not necessary for the property, unless there is an agreement to the contrary effect (Stair, i. 16. 4). All the proprietors have an equal voice in the management; and however small his share is, each is entitled to refuse to act with the other (*Bruce Hunter & Another*, 16 Nov. 1808, F. C.). One *pro indiviso* proprietor has not, as a rule, a title to sue a declarator in regard to the property without the concurrence of the other or others (*Millar*, 1861, 23 D. 743). As Lord Curriehill put it, in an action of declarator of marches, "The party pursuing such an action must be the owner of the property, and, indeed, the exclusive owner of it; for this reason, that the decree would not be *res judicata* against any other party to whom it might in part belong" (*Millar*, 1861, 23 D. 743 and 746). This rule does not hold where there is challenge of an encroachment on the possession of the property. The one proprietor, in such a case, is not entitled to tie up the hands of his co-proprietor (*Lade*, 1863, 2 M. 17 (Ld. Curriehill); *Johnston*, 1855, 17 D. 1023).

Where there is room for a division or sale on account of the subsistence of a liferent, or where the *pro indiviso* right is a liferent, and the parties cannot agree on a manager, the Court will appoint a judicial factor, so as to prevent the control of the common subject falling into the hands of parties who have only a partial interest (*Mackintosh*, 1849, 11 D. 1029; *Watson*, 1856, 19 D. 70; *Watson*, 1856, 19 D. 98; *Martin*, 14 D. 761). It is probable that where the remedy of division and sale is open, it is not competent to appoint a judicial factor, unless in very exceptional cases (*Morrison*, 1857, 20 D. 277). Special circumstances may warrant the

appointment of a factor, even after the decree of division has been obtained (*Bailey*, 1860, 22 D. 1105).

Power of Veto.—One co-proprietor may prevent another from removing tenants unless better rents or better security is offered (*Grozier*, 1871, 9 M. 826), or from sequestrating tenants for rents (*Stewart & Gibb*, 1842, 4 D. 622). All the co-proprietors must concur in granting leases (Hunter, i. 122; Rankine on *Leases*, 74; *Campbell* v. *Campbell*, 24 Jan. 1809, F. C.); so also they must concur in sequestrating a tenant (*Stewart*, 1842, 4 D. 622), or in removing him (*Murdoch*, 1679, 3 B. S. 297). The smallness of interest makes no difference, even if it be $\frac{1}{71}$st part (*Bruce*, 16 Nov. 1808, F. C.). A co-proprietor may prevent any extraordinary use of the subject that may be prejudicial to his interest—such as one of the co-proprietors giving a stranger a right to cut and drive peats (*Wilson* v. *Buchanan*, 1800, Hume, 120); or a lease of shootings (*Campbell*, 24 Jan. 1809, F. C.). A co-proprietor may prevent any operations on the common subject by which its condition is altered, as breaking a wall or door into a common stair (*Taylor*, 1872, 11 M. 25); removing tenants to the prejudice of other proprietors (*Halliday*, 1681, M. 2449); making an entry into a common passage (*Anderson*, 1799, M. 12831; *Reid*, 1799, M. App. 1, Property; *Alexander*, 1840, 3 D. 249); opening doorway in a gable (*Gellatly*, 1863, 1 M. 592); raising a mutual wall (*Dow*, 1869, 8 M. 118); altering a common staircase (*Taylor*, 1872, 11 M. 25; *Sandy*, 2 S. 195; Bell, *Ill.* 152; *Anderson*, 1831, 9 S. 564). The exception to this rule is that necessary operations in rebuilding and repairing are not to be stopped by the opposition of any of the joint owners (Bell, *Prin.* 1075).

Division.—It is obvious that such a condition of ownership as that of which we treat should be capable of being easily brought to an end, if necessary. Hence the rule that, in the absence of agreement of parties, any common owner may insist on having the common property divided, or, if that be impossible, on having it sold and the price divided (Bell, *Prin.* 1079–80–82). This rule of course does not apply to co-partners or trustees, or to such as are in right of a mere *jus accrescendi*, as occurs in some kinds of *mortis causa* destination. The second class above mentioned have their remedy under the Trust Acts (*Kennedy*, 1885, 12 R. 1026). Nor need the owner desirous of selling show cause why (*Frizell*, 1860, 22 D. 1176). The action by which the co-owner obtains his remedy is a lineal descendant of that known to the Roman law as *communi dividundo*, for particulars of which, see the opinion of Ld. Rutherfurd in *Brock*, 1851, 19 D. 701). The process by which this remedy was obtained in former times was by brieve of division; but this has been almost entirely superseded by the declarator of division (and sale), which may be brought either in the Court of Session, if the subjects be of £1000 capital value or £50 annual value, or, if they be below such value, in the Sheriff Court. The action is proper in the Outer House, as not requiring an exercise of *nobile officium* (*M'Bride*, 1862, 24 D. 546). The Court appoints a man of skill, who suggests a scheme of division, or, if that be inadvisable, fixes the price and conditions of sale, *e.g.* a power of bidding reserved to *pro indiviso* proprietors (*Thom*, 1875, 3 R. 161).

An inquiry may be necessary to secure an equal share of profits to the co-owners proportional to their shares in the subject, to ascertain the burdens and allocate them in their due proportions, to repay to one of the owners sums disbursed by him, or to secure restoration of such profits as have been wrongly appropriated (Rankine on *Landownership*, 518). The Conveyancing Act of 1874 has introduced a novelty in the procedure for completing

the transfer, which formerly needed mutual conveyances, by giving the decree of the Court, arbiter, or oversman the value of a conveyance. The titles remain with the owner of the largest interest; but if there be no disparity, are put in neutral hands (Bell, *Prin.* 1085). Should a co-owner refuse to sell, the subject must be proved incapable of division; but a reasonable discretion must be exercised in considering, and the differing interests of the owners kept in view (Ld. Gifford's opinion in *Thom*, 1875, 3 R. 161–5; *Bryden*, 1837, 15 S. 486). Thus an inn cannot be divided into four parts, nor a brewhouse into two (*Milligan*, 1782, M. 2486). See also terms of report in *Thom* (*supra*). The case of *Thom* (*supra*) also lays down that the sale must be by public roup; that power may be retained by terms of articles enabling those interested to offer for the subject; that a co-owner who holds in trust may bring an action of division and sale without power of sale in his trust deed, this being held to be a mere act of administration (*Craig*, 1863, 1 M. 612). The procedure of the Court in these matters is full, strict, and complete, and involve a full inquiry (*Frizell*, 1860, 22 D. 1176). Feudalism bequeathed the practice that, of heirs-portioners taking *ab intestato* or under a clause of "heirs whatsoever" (*Denniston*, 1830, 8 S. 935), the eldest takes, besides her share, and without compensation to the other, such benefits as a title, a mansion-house in the country; but the rule does not hold as to a town house or a mere villa (*Rae*, 1809, Hume, 764). Feu-duties are divided among heirs-portioners, and an heir-portioner need not bring casualties into her reckoning of the recompense due to the others. A blench-holding is a *præcipuum* (*M'Neight*, 1843, 6 D. 128). But no *præcipuum* is due where heirs-portioners take under a special deed (*Catheart*, 1765, M. 5375, 5 B. S. 465).

[Stair, B. i. tit. 16. s. 4, tit. 7. s. 18; Ersk. B. iii. tit. 3. s. 56; Bankt. B. i. tit. 8. s. 40; Bell, *Prin.* 1072; Rankine on *Landownership*, 510.]

Common Property in Roman Law.—Common property (*communio* or *condominium*) exists when more persons than one have a right of property in an undivided thing. Among the civilians, it is defined as *dominium plurium in eâdem re pro partibus indivisis* (cf. *D.* 13. 6. 5. 15). It may originate in contract (*cum societate*), or arise from circumstances (*communio incidens*). In either case, the community of property gives rise, as between the co-proprietors, to a relation similar to *societas*.

The co-proprietors are entitled to the *fructus* in proportion to their shares (*D.* 10. 2. 56). Each owner may alienate his undivided share (*C.* 3. 37. 2); and, on his death, his share descends to his heirs (*D.* 10. 3. 4. 3). Though the rights, or ideal shares, of the co-owners may be unequal, yet all are entitled equally to a voice in the management. However small the share of a co-owner may be, he can effectually resist acts of control by the other co-owners (*D.* 39. 2. 5. 1). Hence the brocard, *In re communi melior est conditio prohibentis*—a paraphrase of a passage in *D.* 10. 3. 28. Each co-owner has a claim for *pro ratâ* relief in respect of expenses necessarily incurred for the benefit of the common subject (*D.* 10. 3. 4. 3). Even co-owners, who have resisted the outlay, are liable equally with those who have actively promoted it, provided the expenses were incurred in doing something which was not merely useful or beneficial, but absolutely necessary to preserve the common subject (*D.* 17. 2. 52. 10: 3. 5. 27 pr.). This liability for necessary expenditure extended from the date that the property was held in common up to the time that judgment was given in a divisory action. Each owner is bound to treat the common property with

the same care as he would his own (*diligentia quam suis rebus*), with the alternative of paying damages (*D.* 10. 3. 8. 2; *D.* 10. 3. 20).

None of the co-owners can be compelled to remain in the community against his will. Hence the maxim, *Nemo in communione potest invitus detineri*, which, according to Sir Henry Maine, obtains universally in Western Europe (Maine, *Anc. Law*, p. 261). Each owner has an absolute right at any time to enforce a division of the subject. The division may be accomplished by agreement *inter se*, if none of the co-owners are minors (*C.* 3. 38. 8); or, failing agreement, any co-owner has a right to a judicial division (*D.* 10. 3. 29. 1; *C.* 3. 37. 5). If the thing is divisible, it is physically divided; if it is indivisible, one party is awarded the whole, subject to an obligation to compensate the others.

There are three kinds of *communio*, according as the parties share the same property, the same inheritance, or the same boundaries, which boundaries have become unascertainable. Corresponding to these three kinds of *communio*, there are three divisory actions (*judicia divisoria*): the *actio communi dividundo* (*q.v.*), the *actio familiæ erciscundæ* (*q.v.*), the *actio finium regundorum* (*q.v.*). By means of a divisory action, a co-owner can assert not only his right to a partition of the common property, but also his right to *præstationes personales*, *i.e.* to indemnification for expenses, or to compensation for damages.

Commons, House of.—(1) *History.*—The origin of the House of Commons dates from Anglo-Saxon times, when the moots of the hundred and the shire were attended by the reeve and four representative men from each township in the district. The principle of representation was gradually extended from these local councils to the Great Council. Thus in 1213, King John summoned four *legales homines* with their *præpositus* from each township in the royal demesnes to a Council at St. Albans, in order to assess the compensation due by the king to the bishops; and in the same year he ordered all sheriffs and bailiffs to send four *discretos homines* from each county to a Great Council at Oxford. In 1254, Henry III. summons two knights of the shire, to be elected by the county court, to the Great Council for the purpose of granting an aid; in 1261, Simon de Montfort and the barons invite three knights from each shire to a conference at St. Albans, whereupon the king summons three knights of the shire to a *colloquium* or Parliament at Windsor. Again, in 1264, four knights of the shire are returned to *Parliamentum*; and in 1265, a Parliament, summoned by Earl Simon in the king's name, contains, besides a number of bishops, barons, abbots, and other magnates, two knights elected by each shire, two citizens from each city, and two burgesses from each borough. This transference of the principle of representation from the local to the central Government of the nation is again exemplified in the National Assembly of Westminster in 1273, in the miniature Parliaments held at York, Northampton, and Shrewsbury in 1282–83, and, above all, in Edward I.'s famous Westminster Parliament of 1295, composed of the same elements as that of Earl Simon in 1265, but summoned in full number, and without suspicion of bias.. At first, this model parliament, consisting of the hereditary, the ecclesiastical, and the representative elements, sat in one house, although the different "estates" probably did not deliberate together. In 1332, we find it distinctly divided into sections, the prelates, earls, and barons deliberating apart from the knights and the burgesses, an arrangement which becomes permanent, probably in 1341, certainly in

1347, when we find the Commons (*i.e.* the knights, citizens, and burgesses together) granting an aid from the shires, cities, and boroughs.

(2) *Powers.*—The powers possessed by the House of Commons consist, generally, in the right to participate in all legislation, a right which may be dated from a declaration of Parliament in 1322, that all public and national affairs shall be treated of in Parliament "by the king and with the consent of the prelates, magnates, and commonalty, as heretofore accustomed." Besides the general powers thus shared with the Crown and the House of Lords (namely, initiation of bills, necessary concurrence in all legislation, care for the national interests, etc.), the Commons possess several powers specifically their own, which may be termed legal and conventional, or written and unwritten respectively. (*a*) The chief power which legally and expressly belongs to the Commons alone, is the power of the purse, —the sole right to grant, appropriate, and control taxation. Their sole right to initiate supply, first expressly claimed in 1386, and successfully vindicated in 1407, has practically been undisputed ever since. Their further right to appropriate supply and audit the public accounts also dates from the latter period, the reign of Henry IV. Another exclusive right is that of impeaching the ministers of the Crown and other public officials for malversation or breaches of trust of which the common law takes no cognisance, the Commons acting as prosecutors, and the House of Lords as judges. Trials of this kind have taken place at intervals from 1376 down to 1805, but have since fallen into disuse. A third exclusive right of the Commons is that of exercising a disciplinary jurisdiction over their own members, and even of expelling them (*e.g.* cases of Wilkes, 1763–74, and Bradlaugh, 1880–86). (*b*) Foremost among the powers which belong to the Commons by tacit, unwritten convention, though unknown to the law, is that of indirectly appointing the ministers of the Crown. The sovereign is bound by a custom, firmly established since the ministry of Pitt (1782–1801), to appoint as Prime Minister the leader of the party which has a majority in the Commons for the time being, and that minister then proceeds to form his Cabinet from among the most distinguished members of the same party. From this exclusive power of the Commons it flows as a corollary that the Cabinet, though nominally responsible to Parliament as a whole (namely, Crown, Lords, and Commons), is really responsible to the Commons alone. In other words, the Cabinet is overthrown by a vote of censure, express or implied, in the Commons, while it remains unaffected by the censure of the Lords or the displeasure of the Crown. And so, too, it follows from the power first mentioned, that the prerogatives of the Crown wielded by the Cabinet now indirectly belong to the Commons.

(3) *Privileges.*—Of the ancient privileges of Parliament, free access to the sovereign, right to his most favourable interpretation of their proceedings, secrecy of debate, freedom from arrest, and freedom of speech, the last-named, which almost alone survives, has ever been the peculiar heritage of the Commons. From the nature of Parliament as a deliberative assembly, this privilege is indeed essential to its very existence: but the right was confirmed by express Statute in 1399, in consequence of its breach in Haxey's case; and though frequently imperilled during the Tudor and Stuart periods, it has never since been seriously questioned. Among other privileges peculiar to the Commons may be mentioned that of appointing their own Speaker, or president, a right which they have exercised uninterruptedly since the election of Peter de la Mare as foreman, prolocutor, or "vant-parlour" of the Good Parliament in 1376. Lastly may be noted the jurisdiction once claimed by the Commons over members of the general

public whom they deemed guilty of "contempt" or "breach of privilege." The last instances of its exercise were that of the Hon. Alexander Murray, who was censured and imprisoned by the Commons for obstructing an election in 1751; that of the printers in 1771, who were reprimanded for reporting the speeches of members; and that of the publisher of a placard reflecting on the conduct of two members, in 1810, who was committed to Newgate for the alleged breach of privilege. It is needless to comment on the former absurd extension of "privilege" to the footman of one member or the rabbit-warren of another; and it may suffice to add that, within its proper limits, the "privilege" of the Commons has been one of the most justly cherished bulwarks of our civil liberty.

[The constitutional histories of Stubbs, Hallam, May, and Gneist; May, *Parliamentary Practice*.]

See Constitutional Law; Parliamentary Election; Franchise; Parliament; Statute Law.

Commonty.—This is a peculiar sort of common property in land, of great antiquity, but now by force of private arrangements, or by stress of Statute, nearly obsolete. There is still ground for dispute whether it arose out of provisions for the cultivation and use of the barony and manor, or whether these were superimposed on it. In historical times it appears as common property in moorland or outfield land, held by persons owning neighbouring lands in severalty, as accessory to the lands so held. It is constituted (in terms which must be distinguished from the terms used in describing Common Pasture (*q.v.*)), expressly by disposition "*cum communiis*," "*cum communio*," "with commonty," adding the name of the moor, or, in the absence of a name, identifying it by means of the possession. Or prescriptive possession may explain a bare grant of land in severalty,—with or without a clause of "parts and pertinents,"—as including a right of commonty, even in opposition to adverse titles in favour of a rival, and to a neglected decree of Court (*E. Fife's Trs.*, 1830, 8 S. 326; 1831, 9 S. 336). The cardinal rule relating to common property of all kinds is respected, and thus each commoner has a veto against attempts by any other to put the common to other than its ordinary use as land for pasturing stock and yielding fuel, feal, and divot. The right to mine or quarry in an undivided common is vested in the commoners jointly, but is thus available only by general consent. The common law of division of common property was found to be too weak to deal with this complicated relation. But a single general Enclosure Act (1695, c. 38) has worked so smoothly as to save Scots landowners from having to resort to private Acts. From its operation are excepted commonties belonging to the king (of which none are known to exist), and commonties belonging to royal burghs (which have nearly vanished, owing to the corruption or improvidence of town councils), and, to some extent, mosses. The action proceeds in the Inner House of the Court of Session under the forms set out in A. S. 18 June 1852, and in the Sheriff Court, where the subject in dispute does not exceed £100 a year, or £1000 of capital value (40 & 41 Vict. c. 50, s. 8 (3)). The division takes place in proportion to the *valued* rents of the principal lands, except in the case of mosses, where the criterion is frontage. No right attaches to the holding of superiorities; and the feu-duties exigible from each claimant are added to his rental in calculating his share of the commonty. Each gets the part thereof nearest to his land. The division cannot proceed under the Act if there be only one owner of the moor, who holds subject to

different rights of common pasturage. But these may, in the course of the process,—though not in virtue of the Statute,—be allocated on the divided lands, or commuted for shares thereof. A simple mode of making up titles to the lands thus, or by arbitration, acquired in severalty, namely, by recording the decree of division in the Register of Sasines, as a conveyance by all the commoners to each, is furnished by the Conveyancing Act, 1874 (37 & 38 Vict. c. 94), s. 35. See SCATTALD.

Communi dividundo actio, in Roman law, is one of the divisory actions, the others being the *familiæ erciscundæ actio* and the *finium regundorum actio*. The object of the *actio communi dividundo* was to secure a judicial partition of property belonging to joint owners, at the instance of one or some of the joint owners (*Inst.* iv. 6. 20). The action could be brought whether the parties were *domini* or merely *boná fide* possessors. In making the partition, the judge, though bound by any agreement which the co-owners might have entered into as to the partition, was otherwise free to act on his own discretion, taking account of any damage done to the *res communis*, or any outlay upon it, or any profit received from it by one of the co-owners in excess of the rest (*Inst.* iv. 17. 4 and 5; *Dig.* 10. 3. 3 and 21). Where the *res communis* could not be divided without being deprived of its value, it might be adjudged to one of the co-owners, an obligation being laid on him to compensate the rest by a money payment; or the *res* might be put up to auction, and the price divided (*Dig.* 10. 3; *Cod.* 3. 37. 3; Savigny, *System*, v. 36; Stair, i. 7. 14; cf. *Milligan*, 1782, Mor. 2486). See COMMONTY; COMMON PROPERTY.

Communio bonorum.—This phrase, borrowed from the French jurisprudence, is used by the institutional writers to denote the moveable estate of both spouses. According to the doctrine laid down by Stair (i. 4. 9. 3), and followed by Erskine (i. 6. 12), there is a communion of goods between married persons. Into this communion or common stock fall the moveable estate of the husband and the moveable estate of the wife, except in so far as this was separate estate from which the JUS MARITI (*q.v.*) had been excluded, or was of the nature of PARAPHERNALIA (*q.v.*).

But as it was never disputed that the husband had absolute control of all the goods said to be in communion, and that the wife had no rights in them whatever during the subsistence of the marriage, the phrase *communio bonorum* was always misleading. Fraser has investigated the history of its introduction into our law (*H. & W.* i. 648 *et seq.*).

By the old law the moveable property contributed by each of the spouses to this common stock reverted to the survivor and the predeceaser's representatives, on the dissolution of the marriage within year and day without the birth of a living child. This rule, invariably excluded where there was a marriage contract, was abolished by sec. 7 of the Intestate Moveable Succession (Scotland) Act, 1855 (18 & 19 Vict. c. 23). By sec. 6 of the same Act, the right of the representatives of a predeceasing wife to one-third or one-half, according as there were children or not, of the husband's moveable estate, or, as it used to be styled, the "goods in communion," was also abolished. After this "the only practical result of the *communio bonorum*, if, indeed, it be a result of that at all, is the JUS RELICTÆ" (*q.v.*) (per Inglis, L. P., *Fraser*, 1872, 10 M. 843). Since the Married Women's Property (Scotland) Act, 1881 (*q.v.*) (44 & 45 Vict. c. 21),

a wife's moveable estate no longer falls at marriage under the JUS MARITI (*q.v.*), and the last vestige of this theoretical communion of goods may be said to have disappeared. In England the doctrine was never accepted (see Pollock and Maitland, *Hist. of Eng. Law*, ii. 399 *et seq.*).

[See Stair, i. 4. 9. 3; Ersk. i. 6. 12, *Prin.* i. 6. 6 (editor's note); Bankt. i. 5. 82, i. 5. 114; Bell, *Prin.* s. 1546; Fraser, *H. & W.* i. 648, ii. 1528; Walton, *H. & W.* 149; Murray, *Prop. of Mar. Persons*, 27.]

See ADMINISTRATION, HUSBAND'S RIGHT OF; JUS MARITI; JUS RELICTÆ.

Communion Elements.—See SACRAMENTS; TEINDS.

Communis error.—This phrase, and the maxim *communis error facit jus*, belong to the sphere of practice, as recognised by law, and are of narrow application. A *communis error* arises when an erroneous practice, in some more or less technical matter, has become general and inveterate; and litigated questions with regard to such errors have been dealt with by the Court of Session by recognition of the practice in the particular case, along with its correction for the future by Act of Sederunt. Thus in early times, in connection with adjudications, a discrepancy between the current practice and the statutory rule under the Act 1672, c. 19, arising "through mistake of the clerks and their servants," and in part condoned, was, by the Act of Sederunt of 26th February 1684, declared to be for the future a ground of complete nullity; and in the next century, in a question with regard to the statutory attestation of the leaves of a seisin under 1686, c. 17, the Lords, by the Act of Sederunt 17th July 1741, upon careful examination as to the practice, "in consideration thereof and the great and general mischief that might arise to the lieges if the objection to the seisin were sustained," repelled the objection, but resolved to make an Act of Sederunt directing the observance of the Act of Parliament. In this last case the resolution to pass an Act of Sederunt seems to have been all that was done. In matters of procedure, outside of statutory provision, the same rule has been applied, and the same remedy applied or suggested—in connection, in one case, with the form of the will of a summons (*Beattie*, 22 May 1830, 8 S. 784), and, in another, with the style of a suspension (*Russell*, 7 July 1837, 15 S. 1263). In the former case, the Lords repelled the objection "in respect of the state of the practice, and the danger of disturbing judicial procedure in past cases"; and in the latter, the Court also repelled the objection, and the majority of the Court, in advising that course, expressed at the same time the opinion that forms of style ought not to be deviated from through "carelessness, ignorance, or conceit" of practitioners, and that an Act of Sederunt founded on their opinion should be passed, which, however, was not done.—[See Watson's Bell's *Dict.*, and Trayner's *Latin Phrases and Maxims, sub vocibus.*]

Company.—See JOINT STOCK COMPANY.

Comparatio literarum.—In a question whether a deed is or is not in the writing of a certain person, it is competent (see BEST EVIDENCE), in both civil and criminal cases, to adduce witnesses who are familiar with

his handwriting, or to compare his writings admittedly genuine with the deed in question, the comparison being made by persons unacquainted with his handwriting. It is plain that the weight of such evidence is much greater in disproof than in proof (Ersk. iv. 4. 71). Even where the witnesses are previously acquainted with the handwriting in question, their evidence should not be regarded as full proof for the Crown in criminal cases (2 Hume, 395). Their intelligence and character (*Forster*, 1869, 7 M. 797, per Ld. Ardmillan), and the nature of the data upon which their opinion is based (Dickson, *Evidence*, ss. 403, 405), are, in civil cases, the measure of the need for corroboration. Their evidence will have great weight if they have frequently seen the person write, or writings acted upon and recognised by him as his. The genuineness of the writings upon which the comparison is founded must be undoubted: and when they are produced by the alleged granter in impeachment of the document in issue, they must be dated before it (*Cameron*, 1830, 9 S. 141; *Ross*, 1837, 15 S. 1219): but his opponent is not so restricted (*Fraser & Wright*, 1835, Bell, *Notes*, 61). Further, the deed may be compared with writings confessedly genuine by the Court, in cases tried without a jury (see *Stirling Stuart*, 1885, 12 R. 610: *Duff*, 1823, 1 Sh. App. 512, 520, per Ld. Ch. Eldon and Ld. Redesdale; *Paul*, 1832, 10 S. 486); by the jury, in both civil and criminal cases (see *Paul, supra*: *Gellatly*, 1851, 13 D. 961): and by experts, whose evidence, taken by itself, at all events, is of little value (see *Forster, supra*). Photographic copies have been admitted for the purpose of comparison (*Stirling Stuart, supra*). Facsimiles have been rejected, and the admissibility of lithographic facsimiles has been doubted (*E. of Fife*, 1816, 1 Murray, 108).

[Stair, iv. 20. 24: Ersk. iv. 4. 71; Hume, ii. 395; Macdonald, *Crim. Law*, 487; Dickson, *Evidence*, ss. 402–411: Kirkpatrick, ss. 87, 127: Best, *Evidence*, ss. 232 *seq.*: Taylor, *Evidence*, ss. 1869 *seq.*] See Opinion Evidence.

Compearance is the term applied to the appearance made by a defender in an action. See Appearance, Entering.

Compensatio injuriarum.—This was a plea at one time competent to a defender, to the effect that the pursuer had caused him injury at least as great as that complained of, whereby the pursuer's claim was extinguished. It was entertained in actions for slander and assault: but since the decision of *Tullis* (1850, 12 D. 867), the law has been that a defender founding on a counter claim of injury, must raise a separate action against the pursuer, and is not entitled to a counter issue in the leading action (*Bertram*, 1885, 12 R. 798). Provocation, however, and the *res gestæ* generally, may be proved in mitigation of damages.

Compensation. — Where the persons who are debtor and creditor in one obligation are at the same time creditor and debtor in another, which has originated in a separate transaction, and where the debt on the one side is commensurable with that on the other, there is in each of the persons a *concursus debiti et crediti*. Each party in the complex relation is at once the other's debtor and the other's creditor, so that the debts, commonly described as mutual, are capable of being used to cancel each other. Though the parties to an onerous contract are similarly related, the co-existing debts in that case are not commensurable, but are

necessarily of different kinds, and therefore do not admit of mutual extinction.

Down till the last decade of the sixteenth century, a person whose creditor in one obligation was his debtor in another, required to bring a counter action, when he was sued in a Scots court, for the debt which he owed and wished to make the debt owed to him stand against it. With a view to the more economical administration of justice, Parliament at length intervened to do away with the need of such a counter action, and to sanction in its stead the proponing of the counter claim as a plea in defence. By the Statute 1592, c. 143, it is provided that "onie debt *de liquido in liquidum*, instantly verified by writ, or oath of party, before the giving of decree, be admitted be all judges within this realm by way of exception, but not after the giving thereof in the suspension or in reduction of the same decree." On its being sustained, the plea thus rendered competent is of effect to extinguish the whole of the debt in one of the obligations, and so much of the debt in the other as is equal thereto. The process is termed compensation, after the name given to it by the Roman lawyers. But in the Roman law compensation, though it had either to be initially agreed to by the parties, or pleaded by one of them and sustained by the judge, operated *ipso jure*, and therefore to all effects as from the date of the concourse (*D.* xvi. 2. 4. 10, 21; *C.* iv. 31. 4. 14). In the law of Scotland, on the contrary, compensation, or "set off," as, in acceptance of the English law term, it is often called, while it has always to be pleaded and sustained (*Cowan*, 1878, 5 R. 581), does not operate *ipso jure* (Ersk. iii. 4. 12; Bell, *Com.* ii. 124). Consequently, it interrupts the currency of prescription only as from the date of its being pleaded, and, besides leaving possible a withdrawal of the plea at any time before sentence (*L. Balmerino*, 1664, Mor. 2681; *Haldane*, 1753, Mor. 2690), it enables a creditor who has more than one claim against his debtor to set off against a demand on the part of the debtor such of the claims as is worst secured, or otherwise least for the creditor's advantage to keep up, even if it be that one which has most recently made a concourse (*Maxwell*, 1738, Mor. 2550.) The rule is, therefore, illogical, though firmly settled by decisions, that the decree sustaining compensation retroacts to the point of time when the two debts began to co-exist, so as to prevent the running of interest on either of them between that date and the period at which they are held to be mutually extinguished (*Cleland*, 1669, Mor. 2682; *Maxwell*, *supra*). It has been doubted (Bell, *Com.* ii. 124) whether interest would be extinguished on a debt bearing interest, when no interest was due on the opposite side. But, on the principle thus suggested, any disparity between the interest on one of the debts and that on the other, when both bear interest, ought to prevent the decree from having a retroactive effect on interest, except in so far as the amount on the one debt is equal to that on the other. Practically, the result would be the same as if the rule were annulled that interest is stopped from the moment of concourse.

The plea of compensation is not barred by the existence of caution or a collateral security for the debt founded on (*Hannay & Sons' Tr.*, 1877, 4 R. (H. L.) 43). But it may be defeated by a right in the party against whom it is pleaded to retain, in security of another debt owed to him, or in security of a cautionary obligation, the debt sought to be compensated (*Irvine*, 1711, Mor. 2686; *Christie*, 1838, 16 S. 1224). See RECOMPENSATION.

Compensable Debts in General.—Every claim on which the plea of compensation is based must have been acquired *bonâ fide*, and not so as to circumvent the opposite party, or put third parties at an unfair disadvantage

(*Finlayson*, 1829, 7 S. 698; *Lawson*, 1831, 9 S. 478). Subject to this fundamental condition, debts, to be compensable, must both be of the same kind, both liquid, and both presently exigible.

1. The debts are of the same kind when both are money debts, or when both consist in a quantity of some one substance, such as corn or wine, not further specified than as corn or wine, and therefore not of different quality. If debts, not originally *ejusdem generis*, be of consent or by decree reduced to terms of money, the effect of compensation goes no further back than to the time when the debts were thus made commensurable (*Murray*, 1711, Mor. 2687). Neither ear-marked money nor a specific *corpus* in the case of any other fungible can be set off: nor can money, even if it be not ear-marked, when it is an alimentary debt (*Reid*, 1884, 12 R. 178), or is held on deposit, or under appropriation to a particular purpose (*Stewart*, 1770, Mor. *voce* Compens. App. No. 2; *Stuart's Exrs.*, 1709, Mor. 2629; *Campbell*, 1781, Mor. 2580; *Campbell*, 1823, 2 S. 484). If the mandate of appropriation fall by the mandant's death or bankruptcy, the mandatary is on principle entitled, in a question with the mandant's representatives or creditors, to set off the sum against a debt due to him by the mandant (*Crs. of Murray*, 1744, Mor. 2626).

2. A debt is properly liquid when its amount is ascertained and constituted against the debtor by his writ or oath or by decree. But in the case of mutual debts, one which can forthwith be made liquid is deemed liquid, and is allowed to be pleaded in compensation of a liquid debt (*Ross*, 1711, Mor. 2568). The condition of instant proof can in general be satisfied only by writ or oath of party, but in some cases the condition has been stretched so as to let in parole (*Seton*, 1683, Mor. 2566; *Brown*, 1686, Mor. 2566; *Muir*, 1697, Mor. 2567). Where, however, the liquidating of an illiquid claim necessitates a protracted inquiry, or otherwise involves delay, as where it depends on the issue of a litigation, the person making the claim will not be allowed, in respect of it, to put off payment of a debt which is liquid and demandable (*Lawson*, 1844, 7 D. 153; *Scot. N.-E. Rwy. Co.*, 1859, 21 D. 700). Pending the judicial decision of a claim which is disputed, as to its existence or its amount, process will be sisted in an action brought to enforce payment of a liquid debt, only if the action on the illiquid claim be raised previously to that on the liquid debt (Mackay, *Pract.* i. 509), and then on a consideration of circumstances (*Ross*, 1895, 22 R. 461). Both of the debts may be of known amount, while one of them has yet to be constituted *habili modo* against the debtor. If a reference to his oath be necessary, and if he admit the debt, the effect of compensation in stopping interest goes back to the time when by his admission the debt became due, because then it was an ascertained sum (*Watson*, 1675, Mor. 2684).

3. A debt is presently exigible when not having as yet suffered prescription, it is actually due, and its term of payment has come (*dies cedit et venit*). Mutual debts must both be presently exigible before they can rateably extinguish each other; for the plea of compensation presupposes a valid demand to have been made on the opposite side for payment, which can only be of a debt that is in fact now payable; and the *rationale* of compensation renders imperative an exact correspondence at the time between the two debts in respect of the time when they are payable as well as in other respects. Thus a person who owes a sum instantly payable cannot meet the demand for payment by pleading compensation on a debt due to him, but not yet payable, or on a debt the payment of which depends on the purifying of a condition. That either a future debt, in which *dies statim cedit sed non venit*, or a contingent debt, in which *dies nec cedit nec venit, nisi*

conditio extiterit, may become so changed in character as to be then subject to compensation, one or other of two possible provisions of law must operate. Either the *jus exigendi* connected with the present debt must be suspended, until the debt which was future or contingent has in ordinary course become present by the arrival of the term of payment or the fulfilment of the condition; or, without any suspension of the *jus exigendi* as to the present debt, the counter debt, whether future or contingent, must, on a calculation of its present value, be commuted into a present debt. These alternative provisions of law originate in the equity which governs all adjustments in bankruptcy, and by the very reason which grounds their existence they are limited in their application to the balancing of accounts in bankruptcy.

A debt prescribed at the time of its being pleaded in compensation cannot be set off against one which is not prescribed, even although the former, before becoming prescribed, may have co-existed with the latter in such a way as to imply a concourse. This rule is absolute as regards the long negative prescription (*Carmichael*, 1719, Mor. 2677), but as regards the shorter prescriptions is qualified by the exception of an instant reference to the debtor's oath to prove the resting-owing of the prescribed debt (Bell, *Com.* ii. 123).

The period of concourse with regard to compensable debts, as between solvent parties, is, then, the point of time prior to a demand for the payment of either, when the two debts began to co-exist as both of the same kind, both liquid and both presently exigible. There can be no concourse in respect of debts one of which arises after payment of the other has been lawfully demanded.

Compensable Debts in Bankruptcy.—The Statute of 1592 does not distinguish between cases in which the parties are solvent and cases in which either or both of them are insolvent or bankrupt. It covers all these cases alike, provided that the mutual debts be of the character just explained. Thus, where two persons are mutually indebted, and one of them becomes bankrupt before either has paid the other, both of the debts being already payable, he who remains solvent is not bound to pay his debt in full and to accept a dividend in respect of the debt owed to him. His plea of compensation, though not stated till after the bankruptcy, goes back to the period of concourse, and, to the extent of the smaller of the debts, is of effect, as from that time, to extinguish both. If his debt to the bankrupt be the greater, he is liable to pay the difference, and no more, just as if both of the parties were solvent; but if the opposite debt to his be the greater, he has a claim to rank for the balance.

If the debt pleaded in compensation have been constituted or acquired within sixty days of notour bankruptcy, or at any time thereafter, with a view to create a preference, the ground of the plea may be cut away under the Statute 1696, c. 5 (*Marshall's Tr.*, 1794, Mor. 1144); but in the absence of such *mala fides* as is here implied, and especially where the one party is not proved and cannot be presumed to have known of the other's notour bankruptcy or insolvency, the Statute seems not to be relevant (*Hepburn*, 1816, F. C.). Sequestration, however, infers notice; and after the date of the first deliverance, or in cessio after the date of the decree, no *concursus* can be made which will enable a debtor to the bankrupt estate to plead compensation. Thus, for instance, a tenant, though on his landlord's bankruptcy he can set off a debt due to him by the landlord against arrears of rent, and even against the rent current at the date of the bankruptcy, cannot set it off against rents to become due after that date. In like

manner a landlord, though on his tenant's bankruptcy he can compensate a debt due by him to the tenant on a claim for arrears and current rent, cannot on that claim compensate a debt due by him to the trustee under an agreement by which the trustee takes possession of the subjects for the purpose of winding up, on condition of the landlord's settling with him as an outgoing tenant (*Taylor's Tr.*, 1888, 15 R. 313; cf. *Smith*, 1893, 21 R. 330). Where, before the tenant's sequestration, the landlord has obtained possession of the crop, etc., he is entitled to set off against the price of it a claim for arrears of rent (*Davidson's Tr.*, 1892, 19 R. 808); but where he has not previously obtained possession, he can neither, on the tenant's bankruptcy, claim a preference for arrears, nor plead compensation, on a stipulation in the lease that the tenant shall hand over the crop to the landlord (*Maclean's Tr.*, 1850, 13 D. 90). So, again, on the failure of a banker, a holder of the banker's notes payable to bearer cannot plead them in compensation, unless he can show that he has held them since before the failure. Where a trust deed for behoof of creditors stands effectual, no creditor can set off a claim accruing to him after the trust has been constituted (*Mill*, 1825, 4 S. 219; *Meldrum's Trs.*, 1826, 5 S. 122).

The rule, demonstrably fair when both parties are solvent, that a debt presently payable cannot be compensated by one which is future or contingent, would work out unjustly, were it enforced, without any previous admission of means to qualify its rigour, when either of the parties was bankrupt; for then it would compel the solvent party to pay twenty shillings in the pound and take a mere dividend in respect of his counter claim. The law of Scotland admits no exception to the rule, even with reference to the circumstances of bankruptcy; but it provides practical remedies for what in those circumstances would otherwise be the inequitable result of the rule. At common law the creditor in a future or a contingent debt, though he cannot use diligence in execution before the term of payment has arrived, or the condition has been purified, may use diligence in security if the debtor be *vergens ad inopiam*. He may, for example, lay an arrestment on the debtor's moveables, so as to prevent their being alienated to his loss. As there are here two distinct obligations, that in which the common or principal debtor is debtor to the arrester, and that in which the arrestee is debtor to the common debtor, and as the primary effect of the arrestment is, at the instance and for the security of the arrester, as creditor in the first obligation, to suspend the *jus exigendi* of the common debtor, as creditor in the second, the two debts are virtually mutual debts between the arrester and the common debtor, for as long as the arrestment remains unloosed. Where, again, mutual debts exist *primo loco*, where one of them is presently payable but the other not, and where the debtor in the latter is bankrupt, the creditor in the debt which is future or contingent stands already in the same relation to the bankrupt as, after using arrestment in security, the arrester virtually stands in to the common debtor. On the ground of reason or principle, therefore, on which the common law suspends the *jus exigendi* of the common debtor at the instance and for the security of the arrester, it suspends the *jus exigendi* of the bankrupt, at the instance and for the security of the creditor in the future or the contingent debt. The existence, in relation to a debt presently payable, of a debt future or contingent, is, in both cases alike, the suspensive condition; but whereas in the one case the mutual relation of the debts has itself to be established by a special process of law, in the other it is established by the mere conformity of the state of facts to a general rule of law.

From the point of view of the creditor, in whose favour the security is created, the suspension of the bankrupt's *jus exigendi* has the aspect of a power vested in the creditor to withhold payment of a debt, the term of payment of which has come, until he be satisfied in respect of a counter claim, the term of payment of which has not yet come, or the payment of which is subject to a condition not yet purified. This is the point of view taken for the most part by the Scots text-writers, who have consequently been led to treat of the matter under the head of retention. The doctrine of retention is admittedly stretched beyond its proper compass when it is applied to debts (Bell, *Prin.* 1410). In strictness, retention is a right which relates only to corporeal moveables, and emerges under conditions by no means identical with those present in the case of mutual debts. See RETENTION. But in spite of the strained analogy which has brought debts within the scope of the doctrine, the right that arises in several states of fact to withhold payment of a debt in security of some counter claim has now a prescriptive title to be termed retention.

The right of security founded on the existence of mutual debts, one of which is presently exigible but the other not, and on the bankruptcy of the party who is debtor in the latter, endures till the term of payment of the secured debt arrive, or till it be seen whether the condition on which payment depends is fulfilled or not. Compensation may or may not be the sequel of retention. It is so only when compensation is pleaded and sustained, and when by the mere efflux of time, or by the occurrence of a particular event, the future or the contingent debt has become a present debt. Retention by the creditor in a future or a contingent debt has of course compensation for its ultimate object; but it has security for its immediate object, and is always effectual as regards that, even although compensation be in the end precluded by the failure of the condition on which the provisionally secured debt depends. Before the modern practice of putting a present value on future and contingent debts received the authority of the Legislature, the final division of a bankrupt estate had to be postponed till in the course of events every contingent debt affecting the estate had been either changed into a pure debt or determined not to be payable at all. The only way to obviate such inconvenient delay in bringing the affairs of the bankruptcy to a close, where there were mutual debts and that which the bankrupt owed was contingent, was by the trustee's selling, at what might prove a serious loss to the estate, the reversion of the *jus crediti* connected with the debt retained by the person standing debtor in it.

The first statutory sanction of the expeditious plan now generally followed in dealing with future and contingent debts, was given by the Bankruptcy Act, 1839 (2 & 3 Vict. c. 41). Under the amended provisions on the subject embodied in the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), the present value of a future debt is the amount of the debt as at the term of payment, under deduction of interest from the date of sequestration, and of any discount beyond legal interest to which the claim is liable by the usage of trade applicable to it (s. 52). The present value of a contingent debt is, on the claimant's application, which must be notified to the bankrupt and to the petitioning or concurring creditor, fixed by the trustee, or, if the trustee has not been elected, by the Sheriff, subject to review by the Court (s. 53). The present value of any annuity granted by the bankrupt is similarly ascertained (s. 54); because an annuity for a definite period practically resolves into a number of future debts, the second having a more remote term of payment than the first, the third than the second, and so on; while

an annuity for an indefinite period resolves into a series of contingent debts, each, after the first, being further contingent, as to its emergence, on the previous one's having become a pure debt at a point of time which marks the expiry of a regular interval.

It is open to the creditor to have a contingent debt valued or not. Even where he is *eodem tempore* debtor to the bankrupt in a debt presently exigible, and claims to set the one against the other, he may either retain the present debt, pending the issue of the contingency affecting the other, or have the contingent debt valued, if it be capable of valuation. The former alternative may result in the extinction of the whole debt owed by him, but it carries the risk of his having sooner or later to pay the whole; the latter alternative is the condition of immediate compensation.

A debt incapable of being valued, as where it depends on a potestative condition, is not therefore incapable of being ranked for; "the trustee would seem to be nevertheless bound to set apart a sum to provide a dividend for the debt until the issue of the contingency" (Goudy, 329). Such a debt will accordingly, it is thought, support the plea of compensation, to the present effect of entitling the creditor to retain a debt owed by him to the bankrupt estate, and to the subsequent effect, if the condition be purified, of rateably extinguishing both debts.

Compensation is competent in bankruptcy on any debt which can be ranked for, where the term of payment of the correlative debt has already come; and "every claim is admissible against the estate, to the effect of drawing a dividend or having it laid aside, which forms or may form against the bankrupt, during his life, a proper debt, whether due presently, or at a certain future time, or depending on a contingency which may emerge during the bankrupt's life" (Bell, *Com.* i. 333). Thus, although where both parties are solvent an illiquid claim of damages cannot be set off against a demand for the price of a subject sold (*Mackie*, 1874, 2 R. 115), such an illiquid claim can on the bankruptcy of the debtor be ranked for, and can consequently be pleaded in compensation (*Sim*, 1868, 41 Sc. Jur. 136). So, too, debts not of the same species, *e.g.* corn and wine, or debts of the same species but not of the same quality, which are incompensable between solvent parties, may in bankruptcy be set off, both being in the process measured in money. In short, since a discharge in bankruptcy, whether in ordinary course of sequestration or on composition, frees the debtor from all liabilities, except debts to the Crown, incurred by him previously to the date of sequestration, the character which mutual debts must have, to admit of their being compensated when both parties are solvent, cannot in any of its particulars, *bona fides* excepted, be deemed necessary at the time of pleading, to ground compensation when one of the parties is bankrupt.

Where a solvent person, who is one of the creditors on a bankrupt estate, is also a debtor to the estate in a debt which remains during the sequestration future or contingent, he cannot plead compensation, and can only rank for his claim, unless the trustee, with consent of the commissioners, as empowered by sec. 176 of the Act of 1856, compound the claim. Thus, where a party insured becomes bankrupt, indebted to the insurance company, the company cannot close the transaction by setting off the debt due by the bankrupt against the surrender value of his policy (*Borthwick*, 1864, 2 M. 595). Where both parties are bankrupt, future and contingent debts on each side may be converted into present debts, and then set off.

Persons between whom Compensation is Competent.—Mutual indebtedness being presupposed, persons may stand in the relation, either through their being the original parties in each of the obligations or through their having

become parties by succession, and either as being the sole debtors respectively or as having co-obligants. In every case, for compensation to be competent between them, they must each bear the same jural character in the one obligation as in the other.

1. Each of the parties mutually indebted may be in that position, either as a direct result of the transactions which gave rise to the debts, or as having come *titulo universali vel singulari* into the place of some previous debtor or creditor. The transfer of a claim by assignation is the only case that needs special comment. An assignation may serve either to produce a concourse or to put an end to one, and as long as both of the persons are solvent, who in virtue of the assignation are made mutual debtors or are taken out of the relation, there is no reason for laying any restraint of law on the exercise of power to assign. Accordingly, where one person is debtor to a second, and the second to a third, an assignation by the third party in favour of the first, if granted and intimated before payment has been demanded by the second party of his claim against the first, will make the first party, instead of the third, the creditor of the second, and, through the concourse thus established, will enable either the first party or the second to plead compensation against the other. If, however, the right of the assignee be not completed by intimation before the other debt has been demanded, or has been vested in a fourth party, concourse through the assignation will be prevented, and so there will be no compensation (*Alison*, 1711, Mor. 2657). On the other hand, where two persons are mutually indebted, an assignation by either of them in favour of a third party, if granted and intimated before payment of the other debt has been demanded, or compensation pleaded on that other debt, will destroy the concourse, and render compensation incompetent between the cedent and his creditor, as well as between the assignee and his debtor. If, however, the right of the assignee be not completed by intimation, the concourse still subsists, to the effect of enabling the creditor of the cedent, as debtor to the assignee, to plead compensation against the assignee (*Paton*, 1627, Mor. 2601).

The principle of justice strikes at the unfair preference which the creation of a concourse by means of an assignation after bankruptcy would bring about. No debtor, therefore, to the bankrupt can take an assignation to a claim against the bankrupt, so as to set off that claim against the debt owed to the estate. Thus the endorsee of a bill, endorsed subsequently to the bankruptcy of the proper debtor, cannot set it off against the debt demanded from him by the trustee. When, however, previously to the bankruptcy, an endorsee has discounted a bill on which he then had a right to plead compensation, and when he is forced or chooses to take it up after the bankruptcy, he is restored to the position in which he stood before he discounted the bill, and may plead compensation on it (*Hannay & Sons' Tr., supra*).

The dissolution, by means of an assignation, of a concourse which existed at the date of bankruptcy can give rise to no preference, when the assignation is by a creditor of the bankrupt's, and the assignation seems therefore to be competent, though practically in the circumstances the power to assign can seldom have an object to call it into exercise. But when the assignation is by the trustee, the consequent dissolution of the concourse must be to the prejudice of the opposite party; and the Court will therefore grant interdict to prevent the trustee from endorsing, for example, a bill to third parties for value, so as to deprive the acceptor of a plea of compensation (*Harvey*, 1866, 4 M. 1128).

An implied assignation is of the same effect in questions of compen-

sation as an express assignation, and is subject, in general, to the same conditions in restraint or control of its operation. Where, for instance, a law agent, in virtue of his hypothec, claims the costs, awarded to his client in an action, from the party found liable, the party thus required to pay cannot set off against the costs a debt due to him by the opposite party; because the implied assignation to the agent, of his client's claim for costs, is deemed to have been made simultaneously with the raising of the action, and the fact of the litigation is deemed equivalent to notice of the assignation (*M'Kenzie*, 1823, 2 S. 401; *Livingstone*, 1833, 11 S. 878; *Strain*, 1890, 17 R. 566).

If all parties be solvent and no other person's right stand in the way, an implied assignation explains the rule, that where a private debtor of one of the partners of a company sues the firm for a company debt, the firm may set off the partner's claim against the demand. But in cases of bankruptcy the rule, though firmly established by decisions (*Bogle*, 1793, Mor. 2581; *Scott*, 1809, F. C.; *Russell*, 1824, 3 S. 63; *Salmon*, 1824, 3 S. 406; *Thomson*, 1855, 17 D. 739), is indefensible on principle; for if the debtor to the partner be bankrupt, and his trustee sue the firm, the partner is not in a position to assign more than a claim for a dividend.

If one of the partners of a solvent company become bankrupt, either when he is in debt to the company but has a private claim against one of the solvent partners, or when he has a claim against the company but is in debt to one of the solvent partners, the solvent partner or the company, as may be, is not allowed to plead compensation against the bankrupt (*Galdie*, 1774, Mor. 14598). Here the principle is sound, that an implied assignation by the company to the solvent partner, or by the solvent partner to the company, would create an unfair preference.

2. Each of the parties mutually indebted may be in that position, either as sole debtor under the obligation in which he stands debtor, or as having one or more co-obligants. Even if the principal obligant be passive or averse, any of the co-obligants, as possessed of interest, may plead compensation. This has been so decided in a number of typical cases, though the doctrine was impugned in the eighteenth century (Kilk. 134). Thus an heir, sued for his ancestor's debt, has been held entitled to compensate it with a debt owed by the creditor to the defunct, though the latter debt, being moveable, belonged to the executor and not to the heir (*Hay*, 1712, Mor. 2571). The reason appears to be, that while the heir in heritage who pays a moveable debt has a claim of relief against the executor, the liability of the heir to pay such a debt is not conditional on the executor's being first discussed. A cautioner in a bond has an obvious interest to extinguish the debt in the bond, and so, if he be also debtor to the person for whom he is cautioner, he is entitled to withhold payment till he be relieved of his cautionary liability (*Town of Aberdeen*, 1709, Mor. 2570). So with regard to the endorser of a bill, as indebted under a separate obligation to the debtor in the bill (*Hannay & Sons' Tr., supra*); though the debtor cannot compensate with any debt due to him by the endorser (*Scougall*, 1762, Mor. 1641; see *London Joint Stock Bank*, 1859, 21 D. 1327). On the same principle, a creditor in a competition, because of the interest which he has to increase the fund of distribution by the cancelling of another creditor's claim, has been held entitled to plead compensation of that claim on a debt due by the claimant to the common debtor, even when the common debtor had neglected to propone the plea in the process of constitution against him (*Rae*, 1738, Mor. 2571; *Middleton*, 1743 Mor. 2573).

3. Each of the parties mutually indebted must be creditor in the same jural character as that in which he is debtor. There can be no *concursus* as regards either party, where, for example, he is creditor in a fiduciary or other special character, and debtor in his private capacity; because here he is in truth two different persons, and concourse means the union in one person of the opposite interests involved in an obligation. Thus a tutor or a judicial factor, while he may, on a debt due to the pupil, or the trust estate, compensate a bond granted by him as tutor or factor (*E. Northesk*, 1670, Mor. 2569), cannot set off a debt owed to him in his fiduciary character against one which he owes on his own account (*Elliot*, 1711, Mor. 2658). So an executor, though he may set off a debt due to the estate against one due by the person deceased, cannot in general compensate a debt of his own with one payable to him as executor (*Stuart*, 1869, 7 M. 366). Where he has the sole beneficial interest in the estate, he may, it is thought (Bell, *Com.* ii. 125), compensate a debt owed by him *proprio nomine* with one due by his creditor to the defunct; because a debt payable to the executor, as executor, is in this case really payable to him for his own behoof, and equity has regard to the fact. Even an executor who has only a partial interest, such as a residuary one, may, it would seem, to the extent of that interest, set off a debt payable to the estate against one exigible from him as a debt of his own; but the debtor to the estate has a right in the circumstances to be satisfied of the adequacy of the executor's beneficial interest. Where several persons are conjoined in a fiduciary office, no one of them, without having first obtained an assignation for value of the claim of the trustees as a body, can compensate, on a debt due to the trust estate, a debt owed by him as an individual.

Support for the exceptions thus stated to the rule concerning executors or other fiduciaries, may be found in certain specialties of the law as to compensation in partnership. Although in Scotland a firm is a distinct person from the persons who compose it, a sole surviving partner, since he alone has the right to sue for partnership debts, may to the utmost limit compensate his private debts with those of the company. And again, if two or more firms with different names consist of the same partners, they are held to be in reality only one company, so that a debt due to one of the firms may be set off against a debt due by the other, or one of the others (*William's Tr.*, 1809, F. C.) Substantial identity is thus recognised as of greater consequence in law than nominal difference. But there is no such identity between two companies, when some of the partners of the one are the sole partners of the other; and it is thought, therefore, though the point has not been decided, that a debtor to the one company cannot plead compensation on a claim which he has against the other (see *Mitchell*, 1869, 7 M. 480).

By reason of a firm's separate existence as a person, compensation may be pleaded, on either part, between a solvent firm and other persons, whether partners of the company or not, but has no proper place either between the firm and a third party as debtor or creditor of one of the partners, or between a partner and a third party as debtor or creditor of the firm (*Mackie*, 1774, Mor. 2575; *Thom*, 1850, 13 D. 134). Where, however, a solvent company is dissolved, a person sued as debtor to the company may, if he be also creditor to one of the partners, plead compensation to the extent of that partner's share in the assets of the company, because on the dissolution of a firm otherwise than by bankruptcy a debt due to it becomes the property of the partners as individuals (*Heggie*, 1858, 21 D. 31; *Mitchell*, *supra*). Where, on the other hand, one of the partners

of a company which is bankrupt or otherwise dissolved, sues a creditor of the company for a private debt, the latter may plead compensation on his claim against the company (*Russell*, 1824, 3 S. 63; *Christie*, 1838, 16 S. 1224); because the liability of a partner for the company debts logically carries with it a liability to encounter the plea of compensation. Where, again, on failure to obtain payment from the company of a debt constituted against it, a creditor of the company sues one of the partners for the company debt, the partner thus called on to pay may plead compensation on a debt due to him as an individual by the creditor of the company (*Lockhart*, 1842, 4 D. 1253); for as soon as personal liability is actually fixed on him, he, as an individual, is in effect substituted for the company as debtor, and, since he is at the same time in his private capacity a creditor of the pursuer's, the necessary *concursus* is at once established.

Between a bankrupt firm and its partners compensation is excluded, since no partner can claim, even for excess advances, in competition with the general creditors of the company (*Johnston*, 1844, 6 D. 627; *ex parte Sillitoe*, 1 G. & J. 374).

The liquidator of a public company is held to be a different person from the company, and therefore, as on the whole the decisions bear out, when such a company is in process of being wound up, a shareholder cannot on a claim against the company compensate calls due by him (*Cowan*, 1878, 5 R. 581). It is not certain that compensation will be admitted even in the absence of an order for winding up (*ib.*, per Ld. Shand).

Transactions which involve agency ground compensation between the principal and the person with whom the agent or factor deals avowedly as agent or factor, but not between the agent and such person, even when the principal remains undisclosed (*Young*, 1852, 14 D. 647; *Miller*, 1852, 14 D. 955; *Lavaggi*, 1872, 10 M. 312; *Matthews*, 1874, 1 R. 1224). Where, however, the agent or factor deals in his own name, whether allowed or privately forbidden by the principal to do so, compensation may be pleaded, on either side, between the agent, in respect of a private debt, and the person with whom he deals (*Johnston*, 1808, F. C.; *Gall*, 1821, 1 S. 75). If the agent hold a *del credere* commission, he is liable in the first instance for the debt to his principal, though the principal has collateral recourse against the debtor: and such an agent appears therefore to have a right, as he has in English law (*Grove*, 1 T. R. 115; *Peel*, 7 Taun. 478), to compensate on the debt for which he is thus responsible, any debt incurred by himself to the same debtor. But that debtor, on being sued by the principal, cannot meet the demand with a plea of compensation founded on a claim against the agent *privato nomine*; because the *del credere* commission, though it qualifies the relation of principal and agent, in which it originates, touches no interest outside of that relation, and so cannot modify the relation of the agent to a third party. For the same reason, a principal, even when his agent holds a *del credere* commission, may, on a claim accruing through the agent, compensate a debt due to the person with whom the agent has transacted (*Ferrier*, 1807, F. C.).

In connection with a policy of marine insurance, the broker, as the common agent of both parties, may either have settled or not with the underwriters. When he has done so, he is the creditor of the party insured, between whom and the underwriters there is therefore no ground of concourse (*Bertrams*, 1810, F. C.). When, however, the broker has not settled with the underwriters, the party insured may meet any claim brought against him in name of the underwriters with a plea of compensation in respect of a counter claim (*Kirk*, 1812, F. C.)

Statutory Bar of the Plea.—Omission to plead compensation by way of exception in the course of an action bars the plea *post sententiam*, whether by way of suspension or of reduction (1592, c. 143), and, unless perhaps when there is error of fact or of law, bars a *condictio indebiti* (*Hamilton*, 1845, 7 D. 295), but does not exclude retention (*Crs. of Glendinning*, 1745, Mor. 2573). When, however, compensation has been proponed, but wrongly repelled, it may be pleaded anew in a suspension or a reduction, if either process be otherwise competent. Notwithstanding the provision by 1672, c. 16, that all defences competent in law may be pleaded against a decree in absence, decrees in absence, as well of the Court of Session as of inferior Courts, are accounted decrees which by the Statute of 1592 bar compensation. Exceptions to the rule are admitted in such cases as those in which the decree in absence has followed on a summons against one of several debtors included in the same summons (*Corbet*, 1707, Mor. 2642; *A.* v. *B.*, 1747, Mor. 2648), or has been set aside as null, or the charge has been turned into a libel (*Wright*, 1676, Mor. 2640). But a decree of furthcoming, pronounced in absence of the arrestee, bars the arrestee from pleading compensation by way of suspension against the arrester on a debt due to the arrestee by the common debtor (*Cunninghame*, 1809, F. C.).

Competent and Omitted is the term applied to the plea which prevents a defender from challenging a judgment regularly pronounced against him, on the ground that there was a defence which was competent to him, but which he omitted to set up (*Macdonald*, 1842, 1 Bell's App. 819). The reason for this plea is thus stated by Stair: "Because litigious parties might draw pleas to a great length, by forbearing to propone all that they might propone in law or fact before sentence, and might again suspend upon new grounds, and so make as many processes and decreets as they could have defences" (iv. 1. 50). It is not, however, a good plea against the decrees of inferior Courts; nor against a minor, unless the plea has been proponed and repelled, *i.e.* stated in Court for the minor, and repelled previous to decree being given (Stair, iv. 1. 44, 46). Nor is such a plea good against a pursuer, who may raise as many actions as he has *media concludendi* (*Macdonald*, 1842, 1 Bell's App. 819, per Ld. Campbell). The plea is as good against heirs of entail as against ordinary persons: the omission of a competent plea by an heir of entail in possession does not prevent a decree in the cause operating as *res judicata* against a succeeding heir, when the litigation is conducted by the heir in possession in *bona fides* (*Carmichael*, 1866, 4 M. 842). This objection excludes pleas founded on the nullity of bills under the Stamp Acts (*Napier*, 1828, 6 S. 500; *Barbour*, 1828, 6 S. 860; see also *Wyse*, 1847, 9 D. 1405; *Ewing*, 1832, 6 W. & S. 222; Stair, iv. 1. 44, 50; Ersk. iv. 3. 3; Shand, *Practice*, pp. 314, 652; Mackay, *Practice*, i. 589).

Competition.—Where there are two or more persons claiming the same right, or claimants on the same fund, there is said to be a competition. The term is usually applied to contests between creditors in bankruptcy (see BANKRUPTCY; SEQUESTRATION); but it is also employed in the processes of ranking and sale and multiplepoinding. Prior to 1856, ranking and sale was the common mode by which the heritable estates of insolvent persons were realised and distributed amongst their creditors. Although

still competent, it has now gone almost wholly into desuetude (see Goudy on *Bankruptcy*, 2nd ed., p. 524). A multiplepoinding is the process by which the claims of different parties on the same fund in the hands of an outside person are determined. Strictly speaking, a multiplepoinding is not competent unless there is double distress, *i.e.* unless there are conflicting claims or interests; but in practice, it is now common for trustees, who desire to free themselves from further responsibility in connection with trust funds, to bring an action of multiplepoinding and exoneration, in which case double distress need not be averred.—[Mackay, *Manual*, 383 *et seq.*; Mackay, *Practice*, vol. ii. 108 *et seq.*] See BANKRUPTCY; SEQUESTRATION; MULTIPLEPOINDING; RANKING AND SALE.

Complaint.—See PETITION AND COMPLAINT.

Complaint, Summary.—A summary complaint is the document by which an inferior judge is informed of the commission of an offence summarily punishable, and asked to grant warrant to bring a named individual before his Court to answer to the resultant charge. A complaint cannot be made orally (*Law*, 1846, Ark. 109). It may be in writing, or printed, or partly written and partly printed (27 & 28 Vict. c. 53, s. 17), and must be in the form provided by the Summary Jurisdiction (Scotland) Acts in all proceedings under the provisions of those Acts (44 & 45 Vict. c. 33, s. 3). In prosecutions under the Tweed Fisheries Acts, and in police prosecutions under general or local Police Acts, the use of special forms is optional (*ib.*). This article is restricted to procedure under the Summary Jurisdiction Acts. See TWEED FISHERIES ACTS and POLICE PROSECUTION.

I. *GENERAL FORM.*—The Summary Procedure Act, 1864, provides two forms of complaint: No. 1, for crimes or offences at common law; and No. 2, for contraventions of Acts of Parliament (27 & 28 Vict. c. 53, s. 4, and Sched. A; *Kemp*, 1889, 2 White, 323). This distinction has to be carefully observed. The following is an example of a complaint stating a statutory charge:—

Under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887.

Inverness, 3rd August 1896. } UNTO THE HONOURABLE THE SHERIFF OF INVERNESS, ELGIN, AND NAIRN.

The COMPLAINT of *A. B.*, Procurator-Fiscal of Court:

Humbly Sheweth,—

That Peter Gow, labourer, 157 Napier Street, Inverness, on 1st August 1896, in the highway leading from Inverness to Daviot, and at a part thereof in Croy Parish, Inverness-shire, fifty yards west from the bridge across the Carnoch Burn, was searched by Alexander Fraser and William Ferguson, constables of the Inverness-shire Police, who had good cause to suspect him of coming from land where he had been unlawfully in pursuit of game, and there was then and there found upon him game, namely, five hares, which he had obtained by unlawfully going on land to the complainer unknown in pursuit of game, contrary to the Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 2; whereby the said Peter Gow is liable to a penalty not exceeding five pounds, and in default of payment to imprisonment in terms of the Summary Jurisdiction (Scotland) Act, 1881, s. 6, and to forfeiture of the said game:

May it therefore please your Lordship to grant warrant to cite the said Peter Gow to appear before you to answer to this complaint; and thereafter to convict him of the aforesaid contravention, and to adjudge him to suffer the

penalties provided by the said Acts; and in the meantime to grant warrant to sell the five hares mentioned in this complaint; and on conviction of the respondent, to direct the proceeds of such sale, with the amount of the penalty, to be paid to the Treasurer of the County of Inverness, as provided by the said Poaching Prevention Act, 1862, s. 2.

According to Justice,

A. B.,
Procurator-Fiscal of Court.

II. *Constituent Parts.*—(1) *Heading.*—The heading, although not indispensable, brings the proceedings *ex facie* of the complaint within the scope of the Summary Jurisdiction Acts, and thus obviates express reference to their enactments (*Murray*, 1872, 11 M. 147; *Armstrong*, 1892, 3 White, 373; *MacEwen*, 1894, 1 Adam, 314).

(2) *Place and Date.*—It is proper to mention the place and date of signing the complaint, although not required by the statutory form (*Crawford*, 1838, 2 Swin. 200; *Holland*, 1867, 5 Irv. 561).

(3) *Address.*—The Court to which the complaint is addressed is described in terms showing that it has jurisdiction.

(4) *Instance.*—It is imperative that the name, designation, and official title (if any) of the person at whose instance the prosecution is instituted should be correctly stated in the complaint. When the concurrence of the public prosecutor is necessary, the words "with concurrence of the procurator-fiscal of Court" are added to the instance. Concurrence is proved by a holograph minute written on the complaint by the procurator-fiscal, *e.g.* "Inverness, 28th November 1894.—I concur in the foregoing complaint.—*A. B., Procurator-Fiscal of Court.*" The want of concurrence, when necessary, vitiates the whole proceedings, and cannot be supplied by amendment (*Lundie*, 1894, 1 Adam, 342).

(5) *Statement of Charge.*—The complaint must charge that which is either a crime at common law or an offence by Act of Parliament, and must contain a specification of facts sufficient to give fair notice to the respondent of the special case he is called upon to meet (*Buist*, 1865, 5 Irv. 210; *Bolton*, 1890, 2 White, 410; *Drummond*, 1896, 4 S. L. T. No. 204). The statement of charge may be divided into seven parts: (*a*) the full name of the respondent, with a designation sufficient to distinguish him from others; (*b*) the date when the matter of the complaint arose; (*c*) the place, parish, and county, or burgh, where such matter arose; (*d*) the manner of committing the crime or offence, set forth in accordance with the provisions of the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35, s. 71); (*e*) in statutory charges, a reference to the Act of Parliament, and the *particular section* of that Act, which declares the offence for which a conviction is sought, imposes the penalty or forfeiture claimed, or authorises the framing of the bye-law (if any) contravened, without setting forth the enactment in words at length (27 & 28 Vict. c. 53, s. 4; 50 & 51 Vict. c. 35, s. 9, and Sched. A; *Hastie*, 1894, 1 Adam, 505; *Buchanan*, 1896, 4 S. L. T. No. 158); (*f*) in all charges, a statement of previous convictions and circumstances (if any) which constitute, in law, aggravations of the offence; (*g*) in statutory charges, a short but accurate statement of the punishments prescribed by the special Act (*Thomson*, 1865, 5 Irv. 45; *Holland*, 1867, 5 Irv. 561; *Galt*, 1873, 2 Coup. 470; *Manchline*, 1878, 4 Coup. 20; *Murray*, 1878, 4 Coup. 124; *M'Leod*, 1892, 3 White, 339; *MacEwen*, 1894, 1 Adam, 314; *Jameson*, 1896, 4 S. L. T. No. 57); and, when lawful and necessary, a restriction of that punishment to the degree competent under the Summary Jurisdiction Acts, *e.g.*

"but such punishment is hereby restricted to a penalty not exceeding ten pounds or imprisonment not exceeding sixty days" (*Young*, 1864, 4 Irv. 541; *Murray*, 1878, 4 Coup. 124; *Clark, etc.*, 1886, 1 White, 191; *Blain*, 1892, 3 White, 221). When an Act of Parliament authorises imprisonment in default of payment of a penalty for a term exceeding the period fixed by the 6th section of the Summary Jurisdiction (Scotland) Act, 1881, the punishment should be expressly restricted to the provisions of the latter Statute. See CRIMINAL PROSECUTION (SOLEMN).

(6) *Prayer.*—The complaint craves: (*a*) warrant to apprehend the respondent, if apprehension is competent, or, if it is not, warrant to cite him to appear; (*b*) his conviction of the crime or contravention charged, using the plural when necessary (*Jamcson*, 1896, 4 S. L. T. No. 57); and (*c*) his punishment with "the pains of law" in a common-law charge, or "the penalties provided by the said Act" in a statutory one, adding, in case of restriction, "restricted as aforesaid" (*M'Leod*, 1892, 3 White, 339). If a complaint for contravention of an Act of Parliament contains no statement of the statutory punishment, it is a mistake to crave "the pains of law" (*Blain*, 1892, 3 White, 221); but an excess in the crave for punishment may not be material, if the sentence is within the limits prescribed by the Act (*Chisholm*, 1871, 2 Coup. 49). The complaint may also contain a crave for a forfeiture of nets or goods, or an order to do anything prescribed by the special Act, *e.g.* the destruction of nets and poaching implements; or for warrant to sell game or perishable goods seized, or to search for and secure specified articles, *e.g.* "and further to grant warrant to search the person, dwelling-house, and repositories of the said John White, and the place in which he may be found, and to seize, remove, and secure the watch mentioned in the foregoing complaint" (27 & 28 Vict. c. 53, s. 6).

III. *AUTHENTICATION.*—A complaint at the instance of a public prosecutor is signed by him or his authorised depute; one at the instance of a private prosecutor, by him or a duly qualified law agent on his behalf (44 & 45 Vict. c. 33, s. 9 (1)). The character in which the person signs is added to his signature, *e.g.* "Procurator-Fiscal of Court," or "Agent of the said Robert Allan, complainer." See CRIMINAL PROSECUTION (SUMMARY).

Completion of Title.—See INFEFTMENT; CONFIRMATION BY A SUPERIOR.

Composition Contract.—A composition contract is an agreement between a debtor and his creditors whereby the latter agree to accept a portion of their debts in full discharge thereof. Such an arrangement is commonly resorted to for liquidating extrajudicially the affairs of an insolvent debtor: while, in the case of a sequestrated bankrupt, the Bankruptcy Act of 1856 makes special provision for winding up a sequestration upon offer of composition accepted by the creditors, with the approval of the Court.

1. *Extrajudicial Composition Contract.*—The debtor may effect the composition contract with each of his creditors individually, or he may enter into it with them as a body: the former arrangement being styled a *special* composition, the latter a *general* composition (Bell, *Com.* ii. 398–9). The terms of the contract are purely a matter of bargain. The composition may be with or without security, and may be in the form of a single present payment or a series of instalments. The most common mode is for the

debtor to grant to each of his creditors bills (with or without additional names as cautioners) for instalments of composition, payable at different future periods. A trust deed may be granted by the debtor, by way of security, for payment of the composition (see *Miller*, 1876, 3 R. 548); or some special asset may be made over to a trustee for distribution among the creditors, in addition to the composition which the debtor obliges himself to pay (see *Mackinnon*, 1881, 9 R. 393). The composition arrangement may expressly provide for particular creditors being treated more favourably than others; but in the absence of such express stipulation, it is an inherent condition of the contract that all the creditors must be treated with equality; and should this condition be violated, any creditor who has accepted the composition is entitled to resile (see *infra*). It may, again, be part of the arrangement that the composition shall be binding on accepting creditors, provided a certain proportion of the whole body of creditors concur; but in the absence of such special stipulation, it is an essential condition of the contract that all the creditors accede to it (Bell, *Com.* ii. 400). It is a not uncommon stipulation, that all the creditors shall concur within a certain specified period. Should the requisite concurrences not be obtained, each of the creditors who has accepted is set free from the arrangement, and may revert to his original claim (*Johnstone*, 1823, 2 S. 229; *Brown*, 1830, 8 S. 847). Any material misrepresentation by the debtor as to the amount of his estate, whereby creditors have been induced to accept a composition, will void the contract (*Baillie*, 1837, 15 S. 893).

The acceptance of a composition is usually and properly recorded in writing. Such writing may be binding although not probative (Bell, *Com.* ii. 398; see *Glass*, 1825, 4 S. 1; *Johnstone*, *supra*; *Kilpatrick*, 1825, 4 S. 80). Proof of the contract may be by a duly authenticated minute of a meeting of creditors (*Johnstone*, *supra*). Where such minute is not signed by the individual creditors, it would probably be enough that they were present at the meeting and intimated no dissent (Bell, *Com.* ii. 399). Where a composition bill was sent to a creditor who had announced his declinature, it was held that the mere retention by him of the bill for a period of ten months did not bind him to acceptance of the composition (*Thew & Co.*, 1881, 8 R. 467). It has not been decided that a composition contract can be proved by parole. As the acceptance of a composition is equivalent to a partial discharge of the debt, the competency of such proof seems doubtful.

A composition may be offered or accepted by any person duly authorised by the debtor or creditor respectively (see *Hollinworth*, 21 Jan. 1813, F. C.). In the case of a firm, it is within the general authority of a partner to accept a composition on behalf of the firm (*Mains & M'Glashan*, 1895, 22 R. 329). It would not, however, be within such authority for a partner to offer a composition to the firm creditors.

Failure to pay the composition agreed on has the effect of reviving a creditor's right to demand full payment of his debt (*Horsefall*, 1826, 5 S. 36; *Callon*, 1851, 14 D. 41; *Woods & Co.*, 1860, 22 D. 723). It is otherwise in a composition contract in sequestration (see *infra*). A creditor is, accordingly, not bound to deliver up his original voucher of debt until the composition is fully paid. Where a creditor did not receive a bill for his composition, it was held not incompetent for him to charge for his original debt, leaving the debtor to plead acceptance of the composition in reduction of the demand (*Dick*, 1845, 8 D. 1). A creditor may be barred from insisting on his original debt, in case of failure to pay the composition, if he has given an absolute discharge in consideration of composition bills

received by him, or other arrangement made (*Neil*, 1833, 12 S. 162). Where a creditor who held a cautionary obligation for his debt stipulated, as a condition of his acceptance of the composition, that the cautioner's consent should be obtained, so as to preserve the creditor's claim against him, and this stipulation was not fulfilled, the creditor was held not bound (*Neil, supra*). Failure to observe the terms of the composition arrangement as to non-essential details is not necessarily fatal to its validity (see *Robertson*, 2 Murray, 306, per Ch. C. Adam).

The principle of equal treatment of the creditors strikes at all secret preferences given by the debtor to particular creditors to secure their accession (Bell, *Com.* ii. 399). No action will lie for enforcement of such preferences, which are regarded as *contra bonos mores*. They may be challenged by any of the other creditors (Bell, *Com., ut supra*), or by the debtor (*Mack*, 25 Nov. 1814, F. C.; *Arrol*, 1826, 4 S. 504), or by the debtor's cautioner (*Arrol, supra*), or, where sequestration of the debtor has supervened, by the trustee in the sequestration (*Macfarlane*, 1864, 3 M. 237). Where, however, the debtor has voluntarily paid the amount of the preference to the creditor, he will be barred from suing for repetition (*Macfarlane, supra*; *Ironside*, 1871, 9 S. L. R. 73). Where a debtor, after arranging a composition settlement, but before being discharged, granted a bill in favour of one of his creditors for further payment of his debt, the creditor's demand on the bill was held good, in the absence of any evidence that, when he agreed to the composition arrangement, any understanding existed that he was to receive more than the other creditors (*Ironside, ut supra*). There is, of course, no objection to a debtor, after discharge, paying any of his debts in full if he chooses. A third party who is *particeps* in a transaction for conferring an illegal preference will be barred, equally with the creditor, from suing the debtor upon his obligation (*Bank of Scotland*, 1870, 42 Jur. 557). It does not seem to validate a preference, that the debtor agrees to pay it out of his future acquisitions (Bell, *Com.* ii. 399). A creditor who becomes cautioner for a composition is in the same position as other creditors in regard to receiving any preference (*Robertson*, 1837, 15 S. 1299).

Where caution has been given for a composition, the cautioner is not released by the subsequent sequestration of the debtor, or by the creditors ranking therein for their full debts (*Thomson*, 1863, 1 M. 913), or consenting to the bankrupt's discharge (19 & 20 Vict. c. 79, s. 56). Where one of the creditors becomes cautioner for the composition, he is entitled, should the debtor thereafter be sequestrated, to rank on the sequestrated estate for the full amount of his debt unpaid, as well as for what he has paid under his cautionary obligation (*Paul*, 19 Dec. 1820, F. C.).

[See Bell, *Com.* ii. 398 *et seq.*; Goudy on *Bankruptcy*, 516 *et seq.*]

2. *Composition Contract in Sequestration.*—Under this mode of winding up a sequestration, the bankrupt obtains retrocession of his estate and discharge of his debts on making payment to his creditors of a rateable proportion of their claims, which they have agreed to accept, with the approval of the Court. The offer of composition must extend to all the bankrupt's debts, whether claims therefor have been lodged or not. Caution for the whole composition must be given. On failure to make payment of the composition, the original debts do not revive, as in the case of an extrajudicial composition. The procedure applicable to composition contracts in sequestration is regulated by the Bankruptcy Act, 1856, and the subject will be found treated at length under the head of SEQUESTRATION.

Composition to a Superior.—See Superiority.

Compound Interest.—See Interest.

Comprising.—See Adjudication for Debt.

Compromise, or transaction, is an agreement between parties for the settlement, by mutual concession, of doubtful claims. "A proper transaction must imply the doubtful event of a plea: and therefore when parties commune, and come to an agreement, by clearing the point of right in their claims on either side, though either party pass from much they claimed, there is no transaction, albeit thereby the vexation of a plea be shunned: for it is more the uncertain event, than the trouble, of legal process, that makes a transaction" (Stair, i. 17. 2). An agreement or transaction regarding doubtful claims is the most difficult of any to overturn (*Stewart*, 1836, 15 S. 112). It cannot be set aside upon the ground that a party was in error as to the law, or as to his legal rights (*Johnston*, 1859, 3 Macq. 619, at p. 631; *Kippen*, 1874, 1 R. 1171). If, however, there has been fraudulent misrepresentation or fraudulent concealment, a compromise may be reduced (*Dempster*, 1873, 11 M. 843; Bell, *Prin.* 535): and where, in the winding-up of a company subject to the supervision of the Court, it was found, while matters were still entire, that the sanction of the Court to a compromise between the liquidator and a creditor of the company had been obtained without the Court being informed of a material fact (although the non-disclosure was without fraudulent intent), the decree sanctioning the compromise was held to be reducible (*D. & W. Henderson & Co.*, 1894, 22 R. 154).

Compromise of an action is within the presumed mandate of counsel. It is no doubt proper that he should obtain the express instructions of his client, or at all events of his agent, before taking a step so decisive, but that is not necessary in order to bind the client in a question with the opposite party (*Duncan*, 1874, 1 R. 329). Counsel is entitled to exercise his own discretion in settling or abandoning an action, even though it be against the express instructions of his client; and an allegation by the client that he has sustained loss in consequence is not relevant to support a claim of damages against the counsel (*Batchelor*, 1876, 3 R. 914). The client's remedy, when counsel declines to follow his instructions, is to withdraw his mandate. Counsel's powers are, however, limited to judicial or forensic acts in the conduct of the cause, and he has no power to make a compromise involving matters collateral to or outwith the subject-matter of the action (*Swinfen* v. *Swinfen*, 25 L. J. C. P. 303, 26 L. J. C. P. 97, and 27 L. J. Ch. 35, 491; also *Swinfen* v. *Chelmsford*, 29 L. J. Ex. 382; *Mackintosh*, 1860, 22 D. 421; *Strauss*, L. R. 1 Q. B. 379; *Duncan, supra*; *Wauchope*, 1863, 2 M. 326). See Advocate. A law agent may be liable in damages if he gives up or compromises a case without instructions (*Black*, 1844, 6 D. 1254; *Urquhart*, 1857, 19 D. 853; *Cormie*, 1862, 24 D. 985; 1863, 1 M. 357). The English rule is different (Begg, *Law Agents*, 95). The agent is, however, in all cases protected if he acts upon the instructions of counsel (*Batchelor, supra*). See Law Agent.

Compromise of an action, like all compromises regarding moveables, may be proved *prout de jure* (Dickson, *Evidence*, 564; *Thomson*, 1868, 7 M.

39; *Love*, 1872, 10 M. 795; *Dewar*, 1892, 20 R. 203). Terms of compromise settled by duly signed joint minute cannot be varied by parole evidence (*Hamilton & Baird*, 1893, 21 R. 120).

Tutors, curators, trustees, and judicial factors have power to compromise doubtful claims and actions (Trusts Act, 1867, s. 2: Trusts Amendment Act, 1884, s. 2; M'Laren, *Wills and Successions*, s. 2199). It is doubtful, however, whether trustees are entitled to enter into a compromise of claims at the instance of one of their own number (*Laurie*, 1892, 19 R. 675). A trustee in bankruptcy may compound with the consent of the commissioners (19 & 20 Vict. c. 79, s. 176; Goudy, *Bankruptcy*, 354). Liquidators of limited liability companies, when the winding-up is by the Court or under supervision, should obtain authority from the Court by petition before entering into a compromise (*City of Glasgow Bank*, 1880, 7 R. 731; Mackay, *Manual*, 575).

When a case has been compromised by the parties, without any provision being made as to expenses, the Court will not thereafter deal with them (*Dobie*, 1856, 18 D. 1043). A client cannot, by settling with his adversary behind the back of his agent, deprive the latter of his right to get decree for expenses against the adverse party in cases where expenses have been actually found due, or where they follow as a consequence of interlocutors previously pronounced, or where the transaction is a collusive one, intended to defeat the agent's rights (*M'Lean*, 1824, 3 S. 190: *Murray*, 1852, 14 D. 501; *Hamilton & Macqueen*, 1854, 17 D. 107; Smith, *Expenses*, 194).

[See Bankt. i. 23. 1; Kames, *Equity*, 181, 365; Mackay, *Manual*, 25, 36, 407, 544, 575; *Practice*, i. 113, 133, ii. 143, 377, 419.]

Compulsion.—Civil compulsion consists in extorting from a person his execution of a deed or instrument in writing, or an expression of his consent to an agreement. Where the compulsion has taken the form of personal violence or acts of force, or threats of these, producing such fear of the consequences of refusal to consent as, in the opinion of the jury, may well have overcome the fortitude of the person concussed, the apparent consent is held to have been granted "*vi majori* or *metus causa*," and to be of no effect to bind the party.

See Force and Fear; Intimidation; Consent.

Computation of Time.—See Time; Day.

Concealing Crimes.—It is the duty of every good citizen, who knows that a crime has been committed, to report that fact to the authorities. He is guilty of no offence, however, if he refrains from communicating his knowledge, provided he is free from all complicity in the crime. But it is a different matter if he exert himself in concealing one who, to his knowledge, has committed a crime. To do so is a criminal offence, punishable by an arbitrary sentence, even although the party concealing the criminal had no knowledge that a crime had been committed until he was asked to conceal the guilty person. As our law does not recognise the doctrine which prevails in England, of accession after the fact, a person who conceals a criminal cannot be punished as an accessory or accomplice if his complicity in the matter goes no further than shielding the guilty person

from the hands of justice. If, however, before the crime was committed, the criminal was assured of protection and concealment afterwards, and on this assurance committed the crime, the person who gave him the assurance, and afterwards hid him from justice, is art and part in his crime, and is liable to the same punishment (Ersk. iv. 4. 13). See ACCESSARY.

Concealment of Pregnancy.—The frequency of child-murder in the seventeenth century, and the difficulty of proving this crime at common law, led to the passing of the Act 1690, c. 21. Under this Statute, if certain *indicia* were proved, the jury were entitled to presume that the crime of child-murder had been committed, and were empowered to convict accordingly. The penalty of death imposed by this Statute was mitigated by the Act of 1809 (49 Geo. III. c. 14), which, however, authorised conviction on proof of the same *indicia* as had to be established under the provisions of the Act of 1690. The presumptive crime, which, under the earlier Statute, was murder, was reduced, by the later Act, to culpable homicide.

The Act of 1809 provides that if a woman "shall conceal her being with child during the whole period of her pregnancy, and shall not call for or make use of help or assistance in the birth; and if the child shall be found dead, or be amissing, the mother, being lawfully convicted thereof, shall be imprisoned for a period not exceeding two years." The Act is applicable to married women as well as unmarried (Hume, i. 298). No charge of art and part can be admitted under the Act. The mother of the child is the only person who can be guilty, she being, by the very nature of the charge, "the one person in the world that is conscious of the birth" (Hume, i. 299).

The Statute requires from the prosecutor proof of three *indicia*, after which he is entitled to ask the jury to hold that the statutory crime has been committed.

1. He must prove that the woman was pregnant, and that she concealed this fact during the whole period of pregnancy. If the dead child is found, it must be established that the accused is the mother. If the child is amissing, the fact of pregnancy will be established by physical signs of recent delivery, and by the evidence of those who noticed the woman's condition prior to the supposed date of the birth. But the prosecutor has further to prove that the accused concealed her state during the whole period of pregnancy, and even till the death of the child, if it was born alive and subsequently died. If she disclose her condition during this period, then this part of the Statute is elided. It is enough that this disclosure is made to one person only, even although that person is the father of the child (Hume, i. 295; *Kellor*, 1850, J. Shaw, 576; *Gall*, 1856, 2 Irv. 366). The disclosure requires neither to be voluntary nor explicit. It may have been made under some constraint, as to a kirk session (Hume, i. 296). The disclosure may be made by conduct or by admissions, which, though not positive, yet amount to a confession. Thus if a woman makes no effort to hide her condition, and openly engages in making clothing for the child, this seems to be a sufficient disclosure (Alison, i. 156; Burnett, 572, note). And the woman may disclose her pregnant condition even by the mode of her denial of its existence (*Skinner*, 1841, Bell, *Notes*, 80). Disclosure at any period of the pregnancy, however early that may be, is sufficient. The prosecutor is not bound to prove that the pregnancy lasted for the full period (Hume, i. 297; *Brown*, 1837, 1 Swin. 482; *Punton*, 1841, 2 Swin. 572). All that is necessary is to show that pregnancy continued long enough to make a live birth possible (Hume, i. 298; Alison, i. 153). It is,

however, in favour of the accused if her labour was premature; but it is no defence that the child was still-born, as this result may have been due to the conduct of the accused in concealing her condition and failing to procure aid at the birth (Hume, i. 298: Alison, i. 154: *Punton, ut supra*).

2. The prosecutor has next to prove that the woman failed to call for or make use of help at the birth. If the woman *bonâ fide* call for help, this is enough to elide the Statute, although assistance is not obtained in time for the delivery. If she obtains help in time, the Statute is elided.

3. The prosecutor must also prove either that the child has been found dead or that it is amissing.

Indictment.—The Criminal Procedure Act of 1887 (50 & 51 Vict. c. 35, Sched. A) gives this form: "You were delivered of a child, now dead or amissing, and you did conceal your pregnancy and did not call for or use assistance at the birth, contrary to the Act 49 Geo. III. c. 14." . . .

This form of charge is open to the adverse criticism which Hume makes against the practice of libelling the death or absence of the child alternatively. The prosecutor must always know whether the child has been found dead or is amissing. Hume adds that neither of the Statutes has given him any dispensation in this respect, "but the command only of two grounds of accusation, either of which he may employ, as the case happens to be."

Punishment.—The maximum penalty under the Statute is imprisonment for two years.

[Macdonald, 147; Anderson, *Crim. Law*, 76.] See CHILD-MURDER.

Concourse of Actions.—By the Roman law different actions were frequently competent to the same person upon the same ground of right, so that the pursuer, after prevailing in the one, might have insisted in the other, in or so far as it was *pinguius*, or contained more than the first (L. 5, s. 1, *Ad. leg. Aquil.*; L. 34, *pr. De obl. et act.*). But, according to the law of Scotland, there is no civil action in which the pursuer has this privilege; for, though in some actions which are in part penal, the pursuer may either restrict his claim to the real damage, or insist for violent profits, as in spulzies, yet if he once restrict his demand to simple restitution, he cannot afterwards sue for the violent profits. Our law, however, admits concourse of actions in cases which may be prosecuted either criminally or civilly; for criminal actions have a different pursuer, and are intended to serve a different purpose from civil. Facts are tried criminally, at the suit of the public prosecutor, to satisfy public justice: while civil actions are brought by the private party for his own redress or indemnification. Accordingly, even although in the criminal trial the panel is acquitted, the private party may institute a civil process against him, founding upon the same facts; and where debt or damages are sought to be recovered, may refer the matter to the defender's oath,—a mode of investigation which is inadmissible in criminal proceedings (Ersk. iv. 1. 64: see also Stair, iv. 48. 9). As to the extent to which the verdict or decree in the one case is admissible as evidence in the other, see Dickson, *Evidence*, s. 385 *et seq.*

See LIS ALIBI PENDENS.

Concourse of Public Prosecutor.—1. *PROCURATOR-FISCAL.*—The concourse or concurrence of the procurator-fiscal is required to every prosecution in the inferior criminal Courts in Scotland at

the instance of a private prosecutor, unless the right to prosecute is conferred by Statute on such prosecutor (Hume, ii. 125; Alison, ii. 111; Macdonald, 283. Cases of *White*, 21 Nov. 1836, 1 Swin. 350; *Graham*, H. C., 29 Jan. 1844, 2 Broun, 85; *Blackwood*, H. C., 1 June 1844, 2 Broun, 206; *Roper*, H. C., 6 Feb. 1860, 3 Irv. 529; *M'Kelvie*, H. C., 3 Dec. 1860, 3 Irv. 631; *Tough*, 28 Apr. 1863, 4 Irv. 366; *Hamilton*, 15 June 1867, 5 Irv. 439; *Duke of Bedford*, H. C., 22 May 1893, 3 White, 493, Ld. Adam, p. 499). Even in civil cases, such as applications to the Court in respect of breach of interdict or breach of sequestration, if penal consequences are prayed for, the concurrence of the procurator-fiscal is required (*Northumberland*, 23 Feb. 1832, 10 S. 366; Dove Wilson, *Sheriff Court Practice*, 442, 492).

Concourse must be given prior to the granting of a warrant of service or of apprehension, and cannot be afterwards adhibited in the course of the proceedings (*Lundie*, H. C., 23 Jan. 1894, 1 Adam, 342). If the terms of a Statute are such as to confer on the procurator-fiscal the sole right of prosecution, then private prosecution, even with his concurrence, will be incompetent. The question as to whether the terms of sec. 3 of the Act 9 Geo. IV. c. 69 (Night Poaching Act) exclude prosecution at the instance of a private complainer with concurrence of the procurator-fiscal, was raised in the cases of *Graham*, *supra*, and *Herbert*, H. C., 26 Dec. 1855, 2 Irv. 346, but was not decided. If the private prosecutor has no title, or an insufficient title, to prosecute, the concurrence of the procurator-fiscal will not cure the defective instance (*Simpson*, H. C., 3 Feb. 1892, 3 White, 167; *Duke of Bedford*, *supra*).

Principle on which Concourse required.—In times when private prosecution was common, the intervention of the procurator-fiscal appears to have been mainly with a view to the protection of the "Fisk," the fund out of which the judges and officials of the Court with which he was connected were paid. Since public prosecution became the rule, his concourse appears to rest on much the same principles as those applicable to the concourse of the Lord Advocate, namely, the protection of individuals from groundless or oppressive prosecutions (Hume, ii. 125, 126; Alison, ii. 111; *Mackintosh*, H. C., 9 and 15 Mar., 20 and 23 May 1872, 2 Coup. 236; *Angus Mackintosh*, H. C., 4 Nov. 1872, 2 Coup. 367; *Alexander Robertson*, Edinburgh, 28 Oct. 1887, 1 White, 468; Article "Procurator-Fiscal," *Journal of Jurisprudence*, vol. xxi.).

Can Concourse be refused?—As a general rule, concourse is granted as a matter of course. No instance of refusal of concourse by a procurator-fiscal appears to have come before the Court; but apparently the dicta of Hume (ii. 126), with reference to the concourse of the Lord Advocate and the principles laid down in the cases above referred to, would apply equally to the procurator-fiscal, who would be justified in declining to grant his concurrence to proceedings which were manifestly groundless or oppressive, or defective in the most primary essentials of relevancy. In the event of concourse being wrongly withheld, the Court would doubtless give the complainer a remedy, probably on similar lines to those which have been indicated by the Court in the event of the Lord Advocate wrongously withholding his consent to proceedings, either by compelling the procurator-fiscal to grant concurrence, or by allowing the prosecution to proceed without his concurrence.

Form of Concourse.—Concourse is granted by the procurator-fiscal writing and signing a short minute of concurrence on the face of the complaint. The fee payable for concurrence is 2s. 6d. This fee was originally fixed, by Act of Adjournal of 21 Mar. 1748, at 14s. 6d. Scots, equal to 1s. $2\frac{1}{2}$d. sterling. This fee had evidently been considered by the

procurators-fiscal inadequate, and an increased fee, varying in different counties, was charged until 1818, when the present fee of 2s. 6d. was adopted, in terms of the Report by the Commissioners on Courts of Justice in Scotland of that year. In cases under Scale II. of the Sheriff Court Table, 1878, the fee is 3s. 4d.

Responsibility of Procurator-Fiscal in Granting Concourse.—The procurator-fiscal is not liable in damages in respect of his concurrence, unless malice is averred and proved (*Arbuckle*, 27 Apr. 1815, 3 Dow, 160).

2. *The Lord Advocate.*—The general rules which have been above explained as governing the question of concourse by the procurator-fiscal, apply to concourse by the Lord Advocate where the prosecution is before the High Court of Justiciary. As is there pointed out, the origin of the practice of requiring concourse has been attributed to the interest of the Public Treasury in fines which might be recovered, in days when heavy pecuniary penalties were exacted more frequently than is the present practice. A further justification of the practice is found by Hume in the circumstance that the necessity for concourse brings the Lord Advocate into touch with the case, and so obviates danger of the compounding of an offence, or other miscarriage of justice. If concourse be regarded in either or both these lights, there would appear to be no good reason why concourse should ever be refused.

Accordingly, at one time concourse was given as a matter of course, and it is maintained by Hume that in the general case it cannot be refused, and indeed it seems to be with hesitation that he admits that it may be refused on account of the frivolous character of the proposed proceedings. It is probable, however, that in view of the now almost obsolete character of private prosecution, and the complete system of public prosecution and police administration which prevails, the Lord Advocate would exercise a far wider discretion than was formerly attributed to him, and would not grant concourse in a private criminal prosecution before the High Court of Justiciary unless under very special circumstances. There seems to be no doubt that if concourse be improperly withheld, the Lord Advocate can be ordained to give it; and it has also been suggested that the Court may authorise the prosecutor to proceed without it, but this is more doubtful. (See the cases of *Mackintosh* and *Robertson*, cited *supra* in the first part of the article, and the authorities cited in the reports of these cases; and on the general question of concourse of public prosecutor, Hume, ii. 125; Alison, ii. 111; Macdonald, 283).

Court of Session.—The concurrence of the Lord Advocate is required in certain quasi-criminal proceedings in which penalties are sought to be recovered in the Court of Session. The origin of this practice was no doubt the interest of the Crown in the penalties. Such concurrence is required in petitions and complaints for breach of interdict, or against magistrates or other judicial or public officers for misconduct or malversation. In actions for contravention of lawburrows, the Lord Advocate must be a joint pursuer. By Statute 15 & 16 Vict. c. 83, s. 43, the concurrence of the Lord Advocate is necessary in actions for reduction of letters patent, and such concurrence is only to be given for just cause shown. Concurrence is not required in petitions and complaints for contravention of the Act of Sederunt of 6 Mar. 1783, interpelling Clerks of Court from practising before their own Court; or in a petition and complaint for fraudulent bankruptcy, but this form of process seems to be obsolete. At one time the concurrence of the Lord Advocate was required, owing to certain legal fictions, in actions of reduction improbation, and of ranking

and sale; but this is no longer necessary (31 & 32 Viet. c. 100, s. 17). As is stated above, in actions for reduction of letters patent the Lord Advocate must consider the case and exercise his discretion. In other cases, his concurrence, according to an old Act of Sederunt (31 Jan. 1673), is supposed to be formal, and therefore never to be refused. But it is probable that concourse would now be refused in the case of any frivolous or scandalous complaint against a public official. (Mackay, *Practice*, 138, and cases there cited.)

Concursus debiti et crediti.—By a concourse of debit and credit is meant the union in one person of the opposite interests which are involved in an obligation. A concourse may have reference either to one and the same obligation or to two distinct but connected obligations. In the latter case the prestations may be different from each other in kind, and therefore incommensurable; or they may be of the same kind, and therefore commensurable. Where the prestations are incommensurable, the obligations, to render a *concursus* possible, must be connected by the fact of their originating together in a single transaction. Where, on the other hand, the prestations are commensurable, the obligations must be connected by the fact of their severally implicating in a reverse relation the same persons as parties.

If there be only one obligation in question, concourse is produced by the succession of the debtor to the creditor, or of the creditor to the debtor, or of a stranger to both, whether as heir or by a singular title. If there be two distinct but connected obligations, arising either as counterparts out of a single transaction or independently out of separate transactions, concourse is in like manner produced by the succession of either party to the other, or of a third party to both. The effect in these cases is *ipso jure* to extinguish the one debt, where there is only one, or both of the debts simultaneously but severally, where there are two. See CONFUSIO.

Apart from the succession of either party to the other, or of a third party to both, concourse to a different effect takes place where the two distinct obligations are connected by the fact of their severally implicating in a reverse relation the same persons as parties. Here each party is, relatively to the other, both debtor and creditor in respect of commensurable debts. There is thus in the person of each a union of the opposite interests which are involved in an obligation, and the concourse of debit and credit on each side necessarily depends on the like concourse on the other. The effect in this case is not to extinguish the mutual debts *ipso jure*, but to ground the plea of compensation, which, on its being sustained, operates the extinction of the debts, if they be equal, or of one of them and *pro tanto* the other, if they be unequal; subject in bankruptcy, when the debt on one side is future or contingent, to a suspension of the *jus exigendi* connected with the debt on the other side. See COMPENSATION; RETENTION.

Condescendence.—The condescendence annexed to a summons is, or ought to be, an articulate statement setting forth the allegations in fact which constitute the grounds of action. In it, accordingly, the pursuer should set forth his title, the grounds of his right or of the defender's liability, and the circumstances which have rendered the action necessary. The condescendence should be limited strictly to the facts which form the ground of action, and should not, as a rule, contain any further detail than is necessary for bare relevancy, both because unnecessary elaboration leads

to increased expense, and because it is usually impolitic for a party, in his pleadings, to disclose more of his case than is necessary to make it relevant and intelligible. Fair notice, however, of the facts to be proved must be given, though it is improper to set forth the items of evidence by which they are to be established. In matrimonial causes, and in cases where fraud is alleged (*Thomson & Co.*, 1895, 22 R. 472), practice requires very full and detailed specification of the material facts. No quotations should be made from statutes, deeds, letters, or other written or printed papers, unless they are part of the grounds of action, or must necessarily be referred to frequently during the discussion of the case, when, for convenience of reference, the material parts may be set forth at length. In other circumstances, if they are mentioned at all, it should be merely by reference. When, however, the action is based, or partly based, upon a private Act of Parliament, the relevant portions should be set forth at length in the condescendence. The condescendence must contain no argument: and irrelevant or scandalous matter may be ordered to be withdrawn, with expenses (*Paton*, 1896, 33 S. L. R. 533 (Ld. Watson); *Wardrope*, 1876, 3 R. 878). The condescendence is followed by a note of pleas in law, which consist of a concise statement, also without argument, of the propositions in law upon which the action is maintained (see PLEAS IN LAW; Mackay, *Manual*, 193: *Pract.* i. 389; 13 & 14 Vict. c. 36, s. 1, Sched. A; 31 & 32 Vict. c. 100, s. 30). The principles above set forth are equally applicable to the framing of the condescendence in actions depending in the Sheriff Court (39 & 40 Vict. c. 70, s. 6; Dove Wilson, *Sheriff Court Practice*, 101).

The condescendence and pleas may be altered or expanded at the adjustment of the record, or, in special circumstances, an order may be made for revisal. See RECORD.

[See CLAIM; MULTIPLEPOINDING; RES NOVITER.]

Condictio causa data causa non secuta.—When a person gave money or other valuable consideration in the special view of a certain event, or on the understanding that he was to receive some counter prestation, and such event or prestation failed, he was allowed by Roman law to bring this action against the other party for recovery of the value received. It was a particular example of the general rule of equity, that no one should be enriched without sufficient consideration (*sine causa*). The object of the giver might be to procure some agreed-on return at the hands of the other party, as when he executed his part under a contract of exchange; or, again, he might have made over property in the anticipation of some future event, *e.g.* he might have given a dowry in view of a marriage which for some reason did not take place, or made a *mortis causa* donation to a person who afterwards predeceased him. The action applied equally to both cases, but there was this distinction: in the latter case the non-occurrence of the contemplated event always imposed the duty of restitution, whereas in the former case it was a good answer to the claim for restitution if the defender could show that his failure to execute the counterpart was due to accident (*fortuitus casus*), or was imputable to the fault of the pursuer. See various examples in the title of the Digest dealing with this action, Book xii. title 4.

Many of the cases would fall under a different principle in our law; but our institutional writers recognise the obligation arising from the "natural duty of restitution" in certain circumstances.—[See Stair, *Inst.* i. 7. 7; Ersk. *Inst.* iii. 1. 10; Kames, *Equity*, 131.]

Condictio indebiti.—In Roman law, a person who, by mistake, paid money which was not due, could recover it by an action known as *condictio indebiti* (*Inst.* iii. 27. 6; *Dig.* 12. 6; *Cod.* 4. 5). The right to recover could not be enforced where the money was due under a natural obligation (*Dig.* 12. 6. 51), or where the party making the payment knew at the time that no debt was due (*Dig.* 50. 17. 53). The question whether money paid under a mistake in law, could be recovered by a *condictio indebiti*, has given rise to much controversy among civilians (the opinions of the leading jurists on this subject are collected by Lord Mackenzie in his treatise on *Roman Law*, 6th ed., at p. 256): but the weight of modern authority is in favour of the view that, under Roman law, money which had been paid by a mistake of law, and not of fact, could not be recovered by the *condictio indebiti* (Savigny, *System*, vol. iii. app. 8, s. 25; *Cod.* 1. 18. 10; 4. 5. 6; *Dig.* 12. 6. 1. 1). Further, every error of fact did not give a claim to restitution, but only such an error as a man, exercising ordinary diligence and prudence, might fall into (*Dig.* 22. 6. 9. 2: 22. 6. 6).

As to the burden of proof, if the defender admitted that the money sought to be recovered had been paid, but alleged that it was paid for a subsisting debt, the *onus* was on the pursuer to prove that the money, though paid, was not due; but if the defender denied receipt of the money, and it was proved that he did receive it, the *onus* was on the defender to prove that the money was due (*Dig.* 22. 3. 25 pr.). Where the pursuer was a minor, a woman, or other person excused for errors in law, the whole burden of proving the fairness and legality of the transaction was laid on the defender (*Dig.* 22. 3. 25. 1).

In Scots law, the term *condictio indebiti* has been adopted to denote the action by which money paid through mistake or ignorance may be recovered. "*Indebiti solutio*, or the payment to one of a debt not truly due to him, is in effect a *pro-mutuum* or *quasi-mutuum*, by which he who made the payment is entitled to an action against the receiver for repayment; which arises not from any explicit consent or agreement of parties, but solely from equity" (Ersk. *Inst.* iii. 3. 54; cf. Stair, i. 7. 9; Bell, *Prin.* s. 531). The *condictio indebiti* corresponds to the action for money paid and received in English law. Scots law follows the Roman law in holding that the action does not lie where the sum paid is due in equity; or where he who made the payment knew at the time that no debt was due (Ersk. *Inst.* iii. 3. 54: Bell, *Prin.* ss. 532, 533; *Stewart's Trs.*, 1875, 3 R. 192; *Balfour*, 1877, 4 R. 454; *Dalmellington Iron Co.*, 1889, 16 R. 535).

Some writers mention, as another exception to the rule, the case where money is paid in consequence of a transaction or compromise. But, as pointed out by Erskine, where a sum is so paid, "the transaction itself creates a debt, though no prior debt had existed" (Ersk. iii. 3. 17; *Stewart*, 1839, Macl. & R. 401; *Kippen*, 1874, 1 R. 1171). The tendency of recent decisions has been to attach less importance to negligence on the part of the person paying in error; and a person so paying is not now precluded from recovering, however careless he may have been in omitting to use due diligence to inquire into the facts. On the other hand, if the money is intentionally paid without reference to the truth or falsehood of the fact, the pursuer meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is entitled to retain it (see per Parke, B., in *Kelly*, 1842, 9 M. & W. 54; *Townsend*, 1860, 8 C. B. (N. S.) 477; *Balfour*, 1877, 4 R. 454). Possession of the means of knowledge is material only as affording evidence that the party had actual knowledge (*Brownlie*, 1880, 5 App.

Ca. 925, *vide* per Ld. Blackburn, at p. 952; *London & R. P. Bank*, 1896, 1 Q. B. 7).

With regard to error in law, the old rule in Scots law was that a *condictio indebiti* could be enforced by one who had made payment owing to a mistake in law (*Stirling*, 1775, Mor. 2930; *Carrick*, 1778, Mor. 2931; *Keith*, 1792, Mor. 2933). Subsequently, however, the House of Lords in two cases laid it down in general terms, that it is not relevant for a party, seeking repetition, to aver that he paid under a mistake in point of law (*Wilson & M'Lellan*, 1830, 4 W. & S. 398; *Dixons*, 1831, 5 W. & S. 445): but the Scots Courts have shown considerable hesitation in accepting the dicta in these cases as finally settling the law of Scotland on this matter (cf. *Dickson*, 1854, 16 D. 586, where doubts are expressed by the Lords President and Ivory as to error in law being in no case a ground for the *condictio indebiti*; see also *Paterson*, 1866, 4 M. 706, and *Mercer*, 1871, 9 M. 618).

[See REPETITION; ERROR; IGNORANTIA JURIS NEMINEM EXCUSAT.]

Conditio si sine liberis.—The doctrine known under the maxim, *Si sine liberis decesserit*, is founded on the equitable presumption that the conditional institution of issue, though not expressed in a testament, would have been expressed had the possible existence of children been present to the testator's mind.

In Roman law, its application seems to have been limited to the case of a testator dealing with his *hereditas*, and to have proceeded on the assumption that the testator did not prefer a stranger to his own issue, but merely did not contemplate the probability of his having issue when he executed the testament; but our law has, in *certain circumstances*, extended it to the case of a beneficiary taking not merely the succession as a whole, but even taking a particular bequest or share thereof. Thus, where a testator has, after naming an institute, made a destination over or a substitution without mention of the institute's issue, or where there is no destination over or substitution, and no mention of the institute's heirs to prevent resulting intestacy, it is, in certain cases at least, presumed that if the testator had contemplated the contingency of the institute having issue, he would have preferred them to the substitutes whom he has named, or to his heirs *ab intestato*, and the conditional bequest only takes place, or intestacy occurs, *si institutus sine liberis decesserit* (Ld. Corehouse in *Greig*, 1835, 13 S. 611).

As it is, however, only an equitable presumption, it must yield to contrary evidence, for "the implied will of a testator ought not to be superinduced upon what he has expressed, except in circumstances making it clear that his true intention is not thereby violated, and a settlement made for him which he would not have made for himself" (per Ld. Ormidale in *Blair's Exrs.*, 1876, 3 R. 368).

1. *Its Application to the Case of a Testator.*—The maxim is then expressed: *Si testator sine liberis decesserit*. But even in this case, before the presumption on which the implication is founded can be raised, it is essential: (1) that the settlement be at least substantially a general settlement (*Yule*, 1758, M. 6400; *Galloway*, 1851, 13 D. 756); (2) that the claim be made on behalf of the issue themselves, and not, after their decease, by their collateral representatives (*Watt*, 1760, M. 6401 and 8170); and (3) that the lapse of time between the birth of the child or children and the death of the testator must not be such as to raise the presumption that the testator, aware of the existence of issue, meant the settlement to stand (*Colquhoun*, 1829 7 S. 709): but how far the lapse of time affects the pre-

sumption is a question of circumstances (*A.'s Exrs.* 1874, S. L. R. 259; *Colquhoun*, 1829, 7 S. 709; *Yule*, 1758, M. 6400).

A child's right to legitim is not a fact in favour of a settlement standing which *ex hypothesi* was made without thought of children, and does not raise the presumption that the parent refrained from altering it because the law made that provision for the child (*Colquhoun, supra*).

Whether the *conditio* applies, and if so, what would be its effect where a parent has provided for his children then in life *nominatim*, and another child is afterwards born who *ex facie* would be excluded from the settlement, is a question which depends largely on circumstances, and no certain rule can be laid down (*Oliphant*, 1793, M. 6603: and Bell, *Folio Cases*, 125; *Anderson*, 1729, M. 6590: reversed on appeal, see 1 Pat. 138, note; *Finlay's Trs.*, 1886, 14 R. 167; *Miller*, 20 R. 1040; and *Elder's Trs.*, 21 R. 704). Where the provision in the settlement is of a several nature, the application of the *conditio* would become practically impossible without holding that the birth of an additional child revoked the settlement (L. P. Inglis in *Spalding*, 1874, 2 R. 246).

2. *Its Application to the Institute.*—The maxim then takes the form, *Si institutus sine liberis decesserit.* While the implied *conditio* has been extended by Scots law to cases of this class, it is not easy to define the limits within which it is applicable. It has been said that the application is limited to cases (*a*) where the settlement is universal, (*b*) where the beneficiaries are a class, (*c*) where the provision is of the nature of a family settlement, and (*d*) where the testator, if not the parent, is at all events *in loco parentis* to the beneficiaries; and undoubtedly these are all *per se* valuable indications in a question of the applicability of the *conditio.* But there are many cases in which the settlement can hardly be said to be universal, and where the beneficiaries can only be said to be a class in a very general sense, in which the *conditio* has still been held to apply.

Two points only seem to be absolutely fixed: *first*, the testator must be the parent of, or *in loco parentis* to, the institute; *second*, there must be no proper *delectus personæ* in the bequest.

(1) The *conditio* was early applied in the case of parent and child (*Binning*, 1767, M. 13047); and it has been suggested that the *conditio* would equally apply, in principle, where the *institutus* was a natural child (*E. of Lauderdale* (*Forbes' Exr.*), 1830, 8 S. 771).

The necessity for its application is not to be obviated by a forced construction of the term children as including "grandchildren" (*Halliday*, 1869, 8 M. 112).

Its application to the case of uncle and nephew was also early settled in *Wallace*, 1807, M. App. *voce* Clause, No. 6, and extended to the case of nephews and nieces by brothers uterine of the testator (*Nicol*, 1876, 3 R. 374). In the case, however, of uncles and aunts, the application of the *conditio* is qualified by this, that the uncle or aunt must have placed himself or herself *in loco parentis*, by which it is not understood that they have during life occupied that position, but that the settlement is similar to what a parent might have been presumed to make in favour of children (L. P. Inglis in *Bogie's Trs.*, 1882, 9 R. 453).

Although an elder brother may often be far more *in loco parentis*, in the ordinary sense, to his younger brother and sisters than an uncle or aunt to nephews and nieces, the *conditio* has been held not to apply to such a case (*Fleming*, 1798, M. 814; *Blair's Exrs.*, 1876, 3 R. 362; *Hall*, 1891, 18 R. 690); and *à fortiori* it is excluded in the case of cousins (*Rhind's Trs.*, 1866, 5 M. 104).

Where the *conditio* applies, it brings in not only immediate issue of the institute, but his descendants *per stirpes* to the remotest degree, on the principle of representation (*Irvine*, 1873, 11 M. 892; *Grant*, 10 R. 92). It may be added that the presumption is more easily raised where the testator is the actual parent than when he is merely *in loco parentis*, (per Ld. Deas in *M'Call*, 1871, 10 M. at p. 284; per Ld. Glenlee in *Hamilton*, 1838, 16 S. at p. 417).

(2) There must be no proper *delectus personæ* in the bequest. This rule was first applied in the case of *Hamilton*, 1838, 16 S. 478, where, from the circumstances of the case, it was held that there was no room for the application of the *conditio*, on the ground that the disposal of the estate was altogether founded on *delectus personarum*, the legatees not being favoured as sister's children, but as individuals (see Ld. Medwyn's opinion: cf. *Fleming*, 1798, M. 8111; *Gillespie*, 1876, 3 R. 561). And the rule is of still more clear application where the settlement gives a simple personal legacy to a beneficiary (see Ld. Neaves, *Douglas*, 1869, 7 M. at p. 510), unless it clearly appears that that is the mode which a testator selects for providing for one to whom he stands *in loco parentis* (*Bryce*, 1878, 5 R. 722).

To the above two general principles it is thought that the other indications formerly mentioned—as that the settlement must be general, the beneficiaries a class, and the provision of the nature of a family settlement—must be referred, and by them must be interpreted and even restricted.

Where the testator is a parent or *in loco parentis*, and the beneficiaries are called, as a class, as my whole nephews and nieces, there is manifestly no *delectus personarum*: but for the application of the *conditio* it is not necessary (1) that the whole of a class be called, (2) that the beneficiaries called are a class in the sense of occupying the same degree of relationship to the testator, or (3) that the class should be benefited equally, provided, in the circumstances, these facts are not inconsistent with there being no exclusive *delectus personarum*.

(1) The assumption of the parental authority by an uncle or aunt does not require them to embrace in their settlement the whole members of the class of nephews or nieces: for when they have once selected the class which is to enjoy their property after their death, selection within that class does not necessarily detract from the assumption of the parental character towards the individuals of the class selected (per L. P. Inglis in *Bogie's Trs.*, 1882, 9 R. 453; see Ld. Shand, *ib.*).

Thus nieces may be called in preference to nephews, presumably as standing more in need of assistance, or an individual member of the class may be excluded, presumably because already provided for, without interfering with the application of the *conditio*, provided the testator has put himself *in loco parentis* to those who remain (*Macgowen's Trs.*, 1869, 8 M. 356; cf. *Grant*, 1862, 24 D. 1211).

(2) Neither is it necessary that the whole beneficiaries should be a class occupying the same degree of relationship to the testator, provided the fact that they are thus a mixed class does not infer *delectus personarum* (*Nicol*, 1876, 3 R. 374; *Bryce*, 1878, 5 R. 722; but see *M'Call*, 1871, 10 M. 281; and *Chancellor*, 1872, 10 M. 965).

(3) Further, it is not necessary that the class should be benefited equally. In the case of *Bryce*, 1878, 5 R. 722, the beneficiaries, the nieces and nephews of the truster, though not called as a class, were all included, and apparently solely on account of their relationship, but they were separately dealt with, the legacies varying in amount, yet the *conditio* was held to apply (cf. *Roughhead*, 1794, M. 6403).

The following incidental points may further be mentioned:—

It is not essential to the applicability of the *conditio* that there should be in the settlement either a conditional institution or a substitution to the institute (see Ld. Chancellor in *Dixon*, 1841, 1 Rob. App. 19); nor that, where the testator is aware that the institute has issue alive at the date of the settlement, he should mention them (*Dixon, ut supra*). Further, knowledge on the part of the testator of the death of the institute, leaving issue, does not *per se* exclude the implication of the *conditio*, notwithstanding that he had the opportunity of altering his settlement expressly (*Booth*, 1831, 9 S. 406, and 1833, 6 W. & S. 175).

Where, on the other hand, the testator, in view of the institute's death, makes provision by subsequent codicil for the institute's issue, the inference is that this is intended to take the place of a conditional institution of issue in the original bequest (*Douglas' Exrs.* 1869, 7 M. 504): but there may be circumstances in which this inference does not hold (*Bryce*, 1878, 5 R. 722). Where the testator had contemplated the contingency of legatees dying and leaving issue, by making certain legacies payable to the issue of legatees in the event of their predecease, the *conditio si sine* will not be implied in the case of a legacy where he had made no such provision (*Carter*, 1892, 19 R. 400).

Where the institute has predeceased the execution of the settlement, it would seem, from the recent decisions in *Morrison's Trs.*, 1890, 18 R. 181, and in *Low's Trs.*, 19 R. 431, that the *conditio* does not apply; though, where the testator is presumably unaware of the predecease of the institute, particularly where he calls the predeceaser *nominatim*, there seems as much ground for applying the *conditio* as there is when the institute survives the execution of the deed, but predeceases the testator (see Ld. Cowan in *Rhind's Trs.*, 1866, 5 M. at pp. 108 and 110).

It is not *per se* an exception to the general rule that the original bequest is in express words restricted to members of a class who may be alive at a certain date (*Gauld's Trs.*, 1877, 4 R. 691; cf. *Wallace*, 1807, M. App. *voce* Clause, No. 6; *Thomson*, 1857, 13 D. 1326; *Aitken's Trs.*, 1871, 10 M. 275; and *Haliday*, 1869, 8 M. 112). Nor does the application of the rule fail because the bequests are expressly to heirs in some cases and not in others in the same deed (*Wilkie*, 1836, 14 S. 1121, and *Dixon*, 1836, 14 S. 938, and 1841, 2 Rob. App. I.).

It has been decided, in conformity with the rule applicable to the express conditional institution of issue (see *Young*, 1862, 4 Macq. 337, 2 Pat. App. 1108), that issue are not entitled, in virtue of the implied *conditio*, to participate in a lapsed share, part of which would have accresced to their parent had he survived (see Ld. Meadowbank in *Thornhill*, 1841, 3 D. at p. 407; cf. *Graham's Trs.*, 1868, 6 M. 820; *Aitken's Trs.*, 1871, 10 M. 275).

It is doubtful whether the *conditio* would apply in the case of successive liferents (*Tulloch*, 1838, 1 D. 94); and it does not operate without regard to the nature of the property in question, but leaves heritage to go to the eldest son, and moveables to the younger children of the predeceasing institute (*Cuthbertson*, 1781, M. 4279; *Grant*, 1862, 24 D. 1211).

Finally, it does not apply in the bequest of specific articles, as silver plate, furniture, etc. (*Broun's Trs.*, 1882, 10 R. 441; *M'Alpine*, 1883, 10 R. 837).

Condition.—See Conditional Obligation; Conditions in Feudal Grants; Offer and Acceptance; Promise; Sale; Legacy; Vesting.

Conditions in Feudal Grants.—"Some things are essential to a feu, some natural, and others only accidental" (Ersk. ii. 3. 11). The first are those without which the feu cannot exist; the second are implied, and must be expressly negatived if they are not to exist; and the third must be expressly conditioned if they are to apply. It is these last only that are at present in question; and even as to them, the greater part of the ground is covered by other articles, *e.g.* BUILDING RESTRICTIONS; BURDENS; and REAL BURDENS.

1. *Personal Services.*—These cannot now be enforced in that form; that is to say, so far as they have not been abolished altogether, either party has the option of compulsory commutation to a cash equivalent. The legislative interference has taken effect in three stages, striking successively at (1) hosting and hunting, (2) suit and presence at head courts, and (3) ordinary services and carriages.

(1) Services of hosting and hunting were abolished by the Clan Act in 1715. The Act declares that "the services commonly called personal attendance, hosting, hunting, watching and warding," are "contrary to the nature of good government, destructive to the liberties of free people, inconsistent with the obedience and allegiance due to His Majesty and Government, as well as the greatest obstruction to the improvement of trade husbandry and manufactories." Stipulations for such services were prohibited for the future; and, as regards existing charters, it was provided that the money value of the services should be paid in future. The value was to be fixed by agreement, or, by arbitration, or failing these methods, then by the Court.

(2) Suit and presence at head courts. In 1747 (20 Geo. II. c. 50, s. 18) all obligations on vassals "to attend, appear, and give suit and presence by himself or his procurator at any head court" were annulled.

(3) Services and carriages. Provision is made for commuting these to cash payments by the 1874 Act (ss. 20 and 21). If for five years there has been actual commutation, whether written or verbal, express or implied, that is made the permanent rule. Failing that, either party may apply to the Sheriff, whose decision is final. The annual value is constituted feu-duty or additional feu-duty by recording a memorandum of agreement or the decree, as the case may be. Entails do not bar commutation.

2. *Restraints on Alienation.*—These have chiefly taken the three following forms:—

(1) Conditions against selling without the consent of the superior. Such conditions were "taken away and discharged" in 1747 (20 Geo. II. c. 50, s. 10), the Court being empowered to recompense the superior in the form of additional feu-duty.

(2) Prohibition against subinfeudation. It was questioned whether this condition was not struck at by the same Statute, but the validity of the condition was upheld (*Campbell*, 1828, 6 S. 679). The constitution of an alternative holding was not a breach of this prohibition (*Colquhoun*, 1867, 5 M. 773). By the 1874 Act (s. 22), it was provided that it should not be lawful in future to create such prohibition or prohibitions against alternative holding. But such prohibitions then already existing were left in force. As to burgage tenements, see BURGAGE (p. 251).

(3) Clause of pre-emption. This is a condition requiring the vassal to give the superior the refusal of the property before selling to a third party, and that at the same price at which it is proposed to sell to the latter if the superior does not exercise his option. It is thought that such a clause may still be validly inserted (*Preston*, 1805, 3 Ross's L. C., L. R. 289; *Mar*,

1838, 1 D. 116). In the latter case it was held that a clause of pre-emption laid upon "the vassal" did not apply to a resale by a purchaser before he took infeftment, on the ground that he never completed the feudal relationship. A clause of pre-emption is practically a serious hindrance to realisation of the property, unless the superior's waiver of it on the particular occasion can be obtained beforehand.

3. *Monopolies to Superiors' Agents.*—It was a practice before 1874 to provide that the agent of the superior should prepare and record all transmissions of the feu. All such conditions were by the 1874 Act (s. 22) declared null and void, whether made before or after the Act.

The 1874 Act (s. 32) makes provision for general feuing conditions being embodied in a deed to be recorded in the appropriate division of the Register of Sasines. Thereafter such conditions may, in whole or in part, be imported into the titles of the lands to which they apply, provided such titles expressly bear that they are granted subject to the conditions as set forth in such recorded deed.

See Building Restrictions; Burdens; Real Burdens; Minerals; Superiority.

Conditional Institute.—See Institute.

Conditional Obligations.—A conditional obligation is an obligation the efficacy of which depends on an uncertain future event. It is distinguished from a *pure* obligation, which is a debt presently due and immediately exigible, and from an obligation *ex die* or *in diem*, sometimes called *future*, in which a proper debt arises from the moment of completing the engagement, but execution is suspended to await the event (Bell, *Prin.* 46; 3 Stair, 1. 46; 3 Ersk. 1. 6). A stipulation truly conditional operates in suspending not only the execution of the obligation, but the obligation itself (Ersk. *ib.*; Bell, *Prin.* 47). All uncertain events are of the nature of conditions, as in the case of a provision payable at a certain age or on marriage (3 Ersk. 1. 7; *Belsches*, 1677, Mor. 6327). But in applying the maxim *dies incertus pro conditione habetur*, it is essential to observe that there must be uncertainty not merely as to when, but as to whether the day will arrive. Hence a provision payable at death is a present debt, payment of which is postponed until an unknown day, which must exist; whereas one payable at a certain age is truly conditional, being payable on a day known, but which may never arrive. Conditions may be not only express, but implied. Thus an obligation to pay a tocher implies marriage as a condition (Bell, *Prin.* 47; 1 Stair, 3. 7; 2 *Dig.* 14. 4, s. 2, 3).

Suspensive and Resolutive.—In the law of Scotland, conditions are either *suspensive* or *resolutive*, terms which nearly correspond with those more generally used in England of conditions precedent and subsequent. It is proposed to deal here only generally of the nature of conditional obligations; and the difficult questions which arise as to their construction and effect must be decided on a consideration of the particular circumstances of each case. See Conditional Institute; Legacy; Vesting; Life, etc., Insurance; Sale. Generally, however, it may be said that when, by the nature of things, or by the terms of an obligation or contract, one thing necessarily precedes another thing, it is a condition precedent; whereas a condition subsequent, instead of suspending the obligation until its accomplishment, makes it cease when it is accomplished, as on the occurrence of an excepted

risk in a charter party (Anson on *Contract*, 277 *seq.*: Addison on *Contract*, 51 *seq.*, 126 *seq.*; Chitty on *Contract*, 620; Leake on *Contract*, 550). "The contingency operates either in suspending the debt or in dissolving it. In either case, the engagement or obligation is independent of the event. The existence or discharge of the debt rests on it entirely. Under a suspensive condition, there is no debt until the event exists (*dies non cedit nec venit*), and yet the engagement cannot be defeated otherwise than by failure of the condition. When the condition is fulfilled, the debt becomes perfect. If the condition be resolutive, the debt at once ceases on the event stipulated" (Bell, *Prin.* 47). If time be of the essence of the contract, the happening of the event by the appointed day, or the impossibility of it, puts an end to the contingency; while if time be not annexed, the contract is pendent while performance of the condition is possible (Bell, *Prin.* 50; *Colvin*, 1857, 19 D. 890). But although the obligation is pendent, the granter is so far bound that he cannot withdraw the hope he has once given: and unless the right is strictly personal, creditors in conditional debts transmit the right to their heirs (3 Ersk. 1. 6). In the event of bankruptcy, the creditor in an obligation suspensively conditional, although he cannot claim a dividend, is entitled to security for payment when the condition is fulfilled; if the condition be resolutive, as in the case of an annuity bond, the obligee, being a creditor *de presenti*, may be ranked in the sequestration for his claim, subject to discount or rebate (Bell, *Prin.* 48: 2 Bell, *Com.* 65; 3 Ersk. *Prin.* 1. 3: 19 & 20 Vict. c. 79, ss. 52, 53).

Possible and Impossible.—Conditions are either possible or impossible, the latter including such as are illegal or *contra bonos mores*. Our law has followed the civil law in recognising an important distinction between the effect of impossible or illegal conditions adjected to ordinary obligations and contracts, and the effect of like conditions contained in wills and voluntary provisions. In the former case, the condition annuls the obligation, as not being seriously intended, or as being in itself destructive; in the latter, the conditions themselves are held *pro non scriptis* (Bell, *Prin.* 49; 1 Stair, 3, ss. 7, 8; 3 Ersk. 3. 84, 85). Treating first of the former class of obligations, it is clear that if the apparent condition is either necessary or impossible, there is no true contingency, and it depends on the positive or negative character of the nominal contingency whether the obligation is to be considered void, or regarded as pure in spite of its conditional form. Thus the condition in a promise to pay £100 if the sun do not rise to-morrow, is the negation of a necessary event, and therefore impossible, and the promise is void; but the condition in a promise to pay £100 if the sun do rise to-morrow is necessary, and the obligation is pure (Pollock on *Contract*, 414 *seq.*; Bell, *Prin.* 49; *Dig.* 44. 7. 31; 45. 1. 7; 46. 2. 9). But mere impossibility of fulfilment by the obligor of a condition in an ordinary obligation or contract is no excuse for non-implement. The impossibility must be inherent in the condition, for the obligor might have guarded himself by the terms of the obligation against causes merely beyond his control (Benjamin on *Sale*, 550). And if a person binds himself to an impossibility, as in an undertaking to fulfil a contract within a certain time, *sibi imputet* (Bell, *Prin.* 34, note (*b*); *Jones*, L. R. 6 Q. B. 115). Nor will an impossible condition annul an obligation if the promiser has taken it upon himself to warrant its possibility (Addison on *Contract*, 132). See OBLIGATION; CONTRACT.

As already stated, morally or physically impossible conditions in wills and settlements are simply held *pro non scriptis*, and the legacy or provision is taken as if the condition had not been adjected to the grant, or had been

satisfied (3 Ersk. 3. 85; Bell, *Prin.* 1785; M'Laren, *Wills and Succession*, 600). So, where a legacy, conditional on purchasing a commission in the army, fell due after purchase was abolished, the legacy was taken unconditionally (*Dunbar*, 1872, 10 Macp. 982). In such cases the law is clear, but there is more difficulty when the condition is not impossible, but merely *unfavourable*, as in the case of restraints on marriage or residence. The law formerly classed these with impossible and illegal conditions, and treated them as unwritten (*Gordon*, 1663, Mor. 2965); but the rule is now relaxed, and they are no longer of necessity ineffectual. If not wholly unreasonable, and if fairly interpreted, they will receive such weight as the judge thinks proper (3 Ersk. 3. 85; Bell, *Prin.* 1785; M'Laren, *Wills and Succession*, 601). Thus reasonable restraints, as against marrying a particular person (*Graham*, 1823, 1 Sh. App. 365), or against marrying—at least during minority or other reasonable period of less-age—without the consent of trustees or friends (Bell, *Prin. ib.*), are effectual. But in the latter case the consent cannot be withheld without good reason; and if it is, the legatee marrying without consent does not forfeit the legacy (*Foord*, 1682, Mor. 2970; *Pringle*, 1688, Mor. 2972; *Wellwood's Trs.*, 1851, 13 D. 1211; *Forbes*, 1882, 9 R. 675). Restraints on marriage, however, that are absolute in form or effect, are disregarded (Bell, *Prin. ib.*; M'Laren, *Wills and Succession, ib.*; 2 Jarman on *Wills*, 900; *Morley*, 1895, 1 Ch. 449). It has been stated, on the authority of the English decisions on wills, that the restriction of a legatee's choice to a particular person, or to a member of a particular class or profession, is void, as having a tendency to absolute prohibition (M'Laren, *ib.*); but it rather appears that the legatee must do what he can to fulfil the condition, which is then held as fulfilled. If, for instance, an obligation is granted "on condition that the granter shall marry a particular lady, law considers the condition purified if he has made addresses to her, although she should have rejected them" (3 Ersk. 3. 85; Bell, *Prin.* 1785, note (*c*); *Mackrath*, 1712, Mor. 2975). But if, through fault or delay on his part, performance has become impossible, the obligation is extinguished (Ersk. *ib.*). As regards restraints on residence, it was held that where a father granted a provision to his daughter exceeding the sum to which she was entitled *ex lege*, on condition that she should not reside with her mother, who was of irreproachable character, the condition was *contra bonos mores*, and the daughter took the provision without regard to it (*Fraser*, 1849, 11 D. 1466). "The doctrine that a degrading or contumelious condition may be disregarded certainly commends itself to reason; but we incline to think that a condition enjoining residence in a particular place is lawful, on the principle that the testator may desire his representative to keep up a connection with the locality of his choice, and that the condition is sufficiently complied with by having a home or place of residence in the locality, and occasionally visiting it" (M'Laren, *ib.*; *Paterson*, 11 D. 441; 2 Jarman on *Wills*, p. 51).

Potestative and Casual.—Possible conditions are either *potestative*, which depend on an act within the power of the obligee, or *casual*, which depend on mere accident, or the occurrence of an event beyond the control of the party burdened with the condition (Bell, *Prin.* 50; 3 Ersk. 3. 85). Potestative conditions in settlements are to secure performance; and generally the condition is held as satisfied if the legatee has done his best to fulfil it, as in the case already mentioned of a legatee enjoined to marry a particular person. Casual conditions are strictly interpreted, and in the general case the occurrence of the event can alone purify them. But alike in casual and potestative conditions, if

the party whose interest it is that the event shall not happen have himself, or through another, impeded or prevented the performance of the condition, it is held as purified. Hence where a bequest was made to A. subject to the condition that B., the granter's executor and residuary legatee, should remain director of a certain company, and B. voluntarily resigned, the condition was held to have been satisfied (*Pirie*, 1872, 11 Macp. 941; and see *Philip*, 1854, 16 D. 1065; *Dick & Stevenson*, 1881, 8 R. (H. L.) 37). But performance of a condition is not impeded in the sense of this rule when the impossibility of fulfilment is occasioned by the mere exercise of an independent right, if that right has not been unfairly concealed, nor acquired with the intention of defeating the obligation (Bell, *Prin.* 50, note (*d*)). So, when a feuar was bound to make a road in front of his feu as soon as a road should be made through adjoining ground belonging to a different superior, and when the feuar himself became proprietor of a necessary portion of the adjoining ground, it was held that he was under no obligation to make, or allow to be made, a road over the part acquired by him (*Paterson*, 1881, 8 R. 646). "It is quite true that if a man has it in his power to perform conditions the fulfilment of which gives rise to a binding obligation against himself . . . and if he obstructs or prevents the condition being fulfilled, the condition will be held in law as being fulfilled. But that relates only to the subject-matter of the contract in which the conditional obligation is contained, and I am not aware that the rule has ever been extended thus far, that whatever other rights or properties he may have the use of which might conduce to the fulfilment of the condition, he is bound to make that use of these independent rights and properties" (per Ld. President in *Paterson, supra*, p. 654). Casual conditions which depend on the voluntary act of a third person must be literally fulfilled. Thus, where the condition of payment under a fire insurance policy was the production of a certificate of character and *bona fides* by the parish minister, the insured was unable to recover without the certificate, however unreasonably refused (*Worsley*, 1796, 6 T. R. 710; Leake on *Contract*, 556; and see *Law*, 21 R. 1027, *Tit-Bits* case). And in building and engineering contracts, where the payment of accounts for work done is conditional on production of an architect's or engineer's certificate, refusal of the certificate, no matter how unreasonable or capricious, is final, unless it be tainted with fraud or be in collusion with the employer (Leake, *Contracts*, 557; Hudson on *Building Contracts*, 315; *Smith*, 1890, Hudson, ii. 71). On the other hand, if payment is conditional on the approval of the employer himself, such approval cannot be unreasonably withheld.

See CONTRACT; OBLIGATION; INSTITUTE; LEGACY; LIFE, ETC., INSURANCE; SALE; WARRANTY.

Condonation.—*What amounts to Condonation?*—Condonation, or *remissio injuriæ*, consists in the full forgiveness by the innocent spouse of the other's adultery. Forgiveness imports such acquiescence as is a bar to an action founded on the wrong forgiven. (For condonation of cruelty, see JUDICIAL SEPARATION.) The best evidence of such full forgiveness is the fact that the injured spouse continued or resumed cohabitation after being made aware of the adultery (Bankt. i. 5. 129; Ersk. i. 6. 45; Fraser, *H. & W.* ii. 1176; *Collins*, 1882, 10 R. 250, 11 R. (H. L.) 19; *Bernstein* [1893], P. 292). It has not been decided in Scotland by an Inner House judgment whether a merely verbal expression of forgiveness, not followed by renewed cohabitation, amounts to con-

donation. Fraser (*H. & W.*, *l.c.*) maintains that it does, affirming that this is the doctrine of the canon law and of Bankton. It is respectfully thought that this is erroneous. The canonists whom Fraser cites (Carpzovius, 2. 11. 197; Sanchez, 10. 14. 1; 10. 5. 19) are not thinking of this distinction. The point they are taking is, that it is not necessary to prove an express declaration of forgiveness. Forgiveness may be inferred from cohabitation, or expressed by word of mouth. But in either case the result is *reconciliatio*, an expression quite inapplicable to the case of a man who says to his wife, "I forgive you, but I will never live with you again." Bankton, i. 5. 129, means the same; and Voet (24. 2. 5) says divorce is barred if *post adulterium perpetratum reconciliatio intercesserit*. Bishop Bernhard, another canonist of high authority, says the husband is barred *cum ipse eam secum retinuit, ex quo manifeste ipsius adulterium deprehendit* (Laspeyre's ed., 187). Other texts to the same effect are cited by Freisen (*Geschichte des Canonischen Eherechts*, 2nd ed., Paderborn, 1893, pp. 836, 844 *seq.*). That learned author sums up the doctrine of the canon law thus: "A second exception (to the right to divorce) is, if the innocent spouse, in knowledge of the other's adultery, nevertheless retains the guilty spouse, and has carnal intercourse with her (or him)" ["Wenn der unschuldige Teil den schuldigen unter Wissen von seinem Ehebruch gleichwohl bei sich behält, und ihn fleischlich erkennt," p. 836). In England the law is now settled that mere words are not sufficient. There must be "something which amounts to a reconciliation, and to a reinstatement of the wife in the condition in which she was before she transgressed" (per Ld. Chelmsford in *Keats*, 1859, 1 Sw. & Tr. 334). This does not necessarily imply sexual intercourse (*ib.*). In *Ralston*, 1881, 8 R. 371, Lord Adam, Ordinary, held condonation established by letters expressing forgiveness, not followed by cohabitation. The Inner House reversed on another ground, and the question was left open. See also *Hunt*, 1893, 31 S. L. R. 244 (Ld. Stormonth Darling). Sanchez (10. 14. 19) thinks condonation may be inferred from caresses, *oscula et amplexus*, voluntarily given by the innocent spouse to the guilty, although there was no sexual intercourse or return to cohabitation. But this would not be sustained (*Hunt*, *ut supra*). On these grounds, it is thought that, to establish condonation, the facts must point to a genuine reconciliation between the spouses, and this would inevitably result in the husband taking the wife back to the conjugal home (cf. the French *Code Civil*, s. 244. See *Newsome*, 1871, L. R. 2 P. & D. at p. 311). Where a husband continues to live under the same roof as the wife after he has discovered her infidelity, there is a presumption that he has condoned her offence. But this may be rebutted on proof that there was no reconciliation, and that they occupied separate rooms. The husband is not to be prejudiced because he did not turn his wife into the street at a moment's notice (*Stedman*, 1742, 6 Pat. App. Supp. 675: *Dance*, 1799, 1 Hag. Ec. 794, note: *Westmeath*, 1827, 2 Hag. Ec. Supp. i. 10; *D'Aguilar*, 1794, 1 Hag. Ec. at p. 781; *Snow*, 1842, 2 Notes of Cases Supp. i. 16: *Beeby*, 1799, 1 Hag. Ec. 789; *Timmings*, 1792, 3 Hag. Ec. at p. 83; *Alexander*, 7 July 1894, not reported (Ld. Kyllachy).

Condonation implied in Mora.—Long delay in bringing the action after knowledge of the offender's guilt raises a presumption of acquiescence, and, unless satisfactorily explained, will be regarded as equivalent to condonation (*Duncan*, 9 Mar. 1809, F. C.: *Anon.*, 1758, 5 Br. Supp. 863; *A. B.*, 1853, 15 D. 976: *Hellon*, 1873, 11 M. 290: Bell, *Prin.* s. 1531; Fraser, *H. & W.* ii. 1199). Much will depend upon the conduct of the parties, and the action will not be barred unless in the circumstances the delay clearly leads to

the inference that there was acquiescence in the injury. The delay may be explained by absence from the country, if the action be raised as soon as the pursuer returns (*Hellon, ut supra*), by misapprehension as to the law (*Tollemache*, 1859, 1 Sw. & Tr. 557), by the honest desire to give the other a chance of reforming (*Green*, 1873, L. R. 3 P. & D. 121; *Mason*, 1883, 8 P. D. 21), or by some other good ground (*Newman*, 1870, L. R. 2 P. & D. 57). In England "unreasonable delay" is a discretionary bar under sec. 31 of the Matrimonial Causes Act, 1857 [20 & 21 Vict. c. 85]. But the view taken there seems to be that the delay must be of the same nature as that which was recognised as a bar at common law, "that sort of delay which would show the petitioner to have been insensible to the loss of his wife, and might almost be said to be equivalent to condonation" (per Wightman, J., in *Pellew*, 1859, 1 Sw. & Tr. 553. See *Nicholson*, 1873, L. R. 3 P. & D. 53; *Beauclerk* [1895], P. 220; *Brougham* [1895], P. 288).

Condonation by the Wife.—A wife will not so readily be held to be barred by condonation. It may appear that she was deterred by fear from taking instant action. And even where this is not the case, her forbearance does not so strongly point to acquiescence in the wrong. It has been said, "It is a merit in her to bear to be patient, and to endeavour to reclaim: nor is it her duty, till compelled by the last necessity, to have recourse to the legal remedy" (*Beeby*, 1799, 1 Hag. Ec. at p. 794. See *Greenhill*, 1822, 1 S. 296; affd. 2 Sh. App. 435; *Durant*, 1825, 1 Hag. Ec. at p. 768; *Angle*, 1848, 12 Eng. Jur. 525; *Peacock*, 1858, 1 Sw. & Tr. 184; Fraser, *H. & W.* ii. 1178). But the plea has been sustained against a wife (*Crs. of Watson*, 1681, Mor. 330; *Anon.*, 1758, 5 Br. Supp. 863. See Lothian on *Consist. Law*, 163; *Westmeath*, 1827, 2 Hag. Ec. Supp. at p. 113; *Snow*, 1842, 2 N. of C. Supp. xiv.).

Condonation presupposes Full Knowledge of the Offence.—A husband is not obnoxious to the plea if he had mere suspicions of his wife's misconduct (*Legrand*, 1782, 2 Pat. 596; *Wemyss*, 1860, 4 M. 660; *Ellis*, 1865, 4 Sw. & Tr. 154; *Collins*, 1882, 10 R. 250; 11 R. (H. L.) 19). But it is condonation if his attitude of mind is one of determination to continue cohabitation whether his wife is guilty or innocent (*Keats*, 1859, 1 Sw. & Tr. 334; Fraser, *H. & W.* ii. 1181). And it appears, though this is more doubtful, that a husband will not be held to have condoned his wife's misconduct, even by cohabitation with her when he is convinced of her guilt, if he has not legal proof of it such as would be sufficient to enable him to get a divorce. For it seems unreasonable to require him to put her away when he would have no good answer to an action by her for adherence and aliment (*Legrand, ut supra*; *Elwes*, 1796, 1 Hag. Con. 292; Fraser, *H. & W.* ii. 1182; Bishop, *Marriage & Divorce*, ii. s. 298).

Condonation will not be extended beyond the adultery which was known to the husband at the time of the reconciliation. For he might be willing to forgive a single act committed in circumstances of strong temptation, but not a course of profligacy (*D'Aguilar, ut supra*; *Durant*, 1825, 1 Hag. Ec. 773; *Turton*, 1830, 3 Hag. Ec. at p. 351; *Bramwell*, 1831, 3 Hag. Ec. at p. 629; *Bernstein* [1893], P. 292). So the fact of a husband having condoned his wife's adultery with A. will not bar him from raising a divorce on the ground of her adultery with B. prior to such condonation, and unknown to the husband when he forgave her misconduct with A. As to A., the condonation remains effectual (*Ralston*, 1881, 8 R. 371; *Bernstein, ut supra*). And the condonation of an act of adultery with A. will not bar the husband from founding on another act with A. subsequent to the condonation (*Collins, ut supra*; *Ferrers*, 1788, 1 Hag. Con. 130; *Wilton*, 1859, 1 Sw. & Tr. 563; *Alexandre*, 1870, L. R. 2 P. & D. 164; Sanchez, x. 5. 20). But a husband who discovers

that his wife has been carrying on an adulterous intercourse for some time may condone her misconduct without precise knowledge of every act, and could not afterwards raise a divorce on the ground that she confessed to nineteen acts, but he had discovered that she had been guilty of twenty.

Effect of Condonation.—Condonation of an offence completely blots it out as a ground of DIVORCE (*q.v.*). But it does not, contrary to the opinion of Fraser (*H. & W.* ii. 1179), prevent the condoned adultery being referred to in a subsequent action of divorce, for the purpose of throwing light upon doubtful conduct subsequent to the condonation (*Robertson*, 1888, 15 R. 1001. See *Collins, ut supra*). Nor does it bar the husband from raising an action of damages against the paramour (*Macdonald*, 1885, 12 R. 1327).

Pleading and Practice as to Condonation.—It ought to be pleaded on the record, but if the facts proved at the trial establish condonation, it is *pars judicis* to refuse divorce (Fraser, *H. & W.* ii. 1183: *Curtis*, 1854, 4 Sw. & Tr. 234; but see *Suggate*, 1859, 1 Sw. & Tr. 492). The plea may be stated by creditors (*Greenhill*, 1822, 1 S. 296, 2 Sh. App. 435). It is not the duty of the Lord Advocate to insist in a plea of condonation which has been stated by the defender and subsequently withdrawn (*Ralston*, 1881, 8 R. 371). In most cases the proof as to adultery is taken first, but in special circumstances the plea of condonation might be treated as a preliminary plea (*Greenhill, ut supra*: *Taylor*, 1832, 10 S. 680). In a singular case, in which the Lord Ordinary's interlocutor granting divorce was recalled, a plea of condonation since its date was admitted as relevant as to acts of adultery which the Lord Ordinary had held not proved (*Robertson*, 1888, 15 R. 1001).

[See Bankt. i. 5. 129; Ersk. i. 6. 45; Bell, *Prin.* s. 1531: Fraser, *H. & W.* ii. 1176; Sanchez, 10. 5. 19: 10. 14. 1; J. Voet, 24. 2. 5; Walton, *H. & W.* 48, 54; Bishop, *Marriage & Divorce*, ii. s. 269.]

Confarreatio.—According to early Roman ideas, marriage necessarily implied the complete subjection of the person and property of the wife to the marital power (*manus*) of the husband. Gaius (*Inst.* i. 112 *seq.*) describes three modes by which this power might be conferred. The most ancient of them was the religious ceremony of *confarreatio*, which united the parties in marriage by solemnly admitting the wife to participate in the sacrificial observances (*sacra*) of the husband's family. The name is derived from the ritual employed, the chief feature being the offering of a cake of spelt (*far*) to Jupiter in the presence of ten witnesses; the celebrants were the *pontifex maximus* and the priest of Jupiter (*flamen dialis*); and a set form of words was used which has not been preserved. The nature of the rite indicates that it was of pre-Roman origin, and that it was confined exclusively to members of the patrician *gentes*. It was only the issue of a confarreate marriage who were eligible for certain priestly dignities; and the sacredness of the tie is further shown by the fact that, if circumstances arose warranting a divorce, an equally solemn religious ceremony, known as *diffarreatio*, was employed for the dissolution of the marriage.

In the mature Roman law, "free" marriage, *i.e.* marriage unaccompanied by *manus*, displaced the older conception. Such a marriage was constituted by simple consent, and gave the wife ample independence. It is probable that the practice of *confarreatio* would have ceased much earlier than it did, had it not been artificially kept alive for the purpose of providing persons with the necessary qualification for filling the priestly

offices (Tac. *Ann.* iv. 16). It finally disappeared with the overthrow of paganism.

Confession.—See Admissions and Confessions.

Confident Person.—See Conjunct or Confident.

Confidential Communications.—1. *Between Parties on the same Side of the Cause.*—Communications, verbal or written, between parties (*Rose*, 1847, 10 D. 156; *Tunnett, Walker, & Co.*, 1873, 11 M. 931); or between the counsel and agents of parties (*Stein & Marshall*, 1804, M. 12443; 1805, M. App. "Proof," No. 1), who are engaged on the same side of a cause, *e.g.* as co-defenders, are privileged. The privilege has been extended to the reports to a railway company by its servants with reference to an accident (*Stuart*, 1896, 33 S. L. R. 731; cf. *Wark*, 1855, 17 D. 526; 1859, 3 Macq. 467, noticed below).

2. *Between a Client and his Legal Adviser.*—In England, the privilege extends to all communications passing between a client and the legal adviser whom he has professionally employed, in the course and for the purposes of that employment. It is not necessary that they should be made in relation to a litigation, either actual or prospective (*Greenough*, 1 Myl. & K. 103, per Ld. Chan. Brougham; *Pearse*, 1 De G. & Sm. 25; *Lawrence*, 4 Drew. 485, appr. in *Minet*, L. R. 8 Ch. App. 361). In Scotland, it is undoubted that such communications, made with reference to proceedings contemplated, threatened, or instituted, are privileged (*Lady Bath's Exrs.*, 12 Nov. 1811, F. C.; *Gavin*, 1830, 9 S. 213; *Jarvis*, 1841, 3 D. 990; *Rose, ut supra*; *Wark, ut supra*; *Hay, Thomson, & Blair*, 1858, 20 D. 701); but authorities conflict as to whether they are equally favoured when not made *in causâ* (cf. *Bower*, 28 May 1810, F. C.; *Kinloch*, 1795, Hume, ii. 350; Ersk. iv. 2. 25, Ivory's Note; Burnett, 436; 2 Al. 469, with *Leslie*, 1760, 5 Bro. Supp. 874, and the cases next cited). The more recent *dicta* go to sanction the adoption of the English rule (*Lumsdaine*, 1828, 7 S. 7, per Lords Alloway and Pitmilly; *M'Cowan*, 1852, 15 D. 229, per L. J. C. Hope and Ld. Wood; *Munro*, 1858, 21 D. 103, per Ld. Pres. M'Neill. See, however, per Ld. Deas in that case, and per Ld. Ardmillan in *Fowler*, 1872, 44 Sc. Jur. 332; affd. 1874, 11 S. L. R. 485). It is thought that the same principles apply in the case of a memorial for counsel's opinion, and the opinion itself (Bell, *Prin.* s. 2254; *Thomson's Trs.*, 1823, 2 S. 262; *Clark*, 1824, 3 Murray, 455; see Dickson, s. 1675). Whether communications are, or are not, confidential, depends solely upon their nature, and not upon any undertaking, *e.g.* a promise of secrecy (*Leslie, Bower, ut supra*). The privilege does not cease on the termination of the employment; it is perpetual (*Lady Bath's Exrs., ut supra*; *Hyslop*, 1816, 1 Murray, 17; *Wight*, 1828, 4 Murray, 587; Taylor, s. 927. Cf., however, *Fowler, ut supra*, per Ld. Deas). It is confined to communications between the client, his relations, or witnesses (*Leslie*, 1760, 5 Bro. Supp. 874; Alison, ii. 470. *Contra Mackenzie*, 2 Curt. Eccl. Cas. 866; Taylor, s. 932), and his professional legal advisers, *i.e.* counsel, law agents, and their clerks (Dickson, s. 1665); and appears to apply where they pass through the medium of a third person, at all events in cases where such mediation is unavoidable (*Campbell*, 1823, 2 S. 139; *Jarvis*, 1841, 3 D. 990; *Hope*, 1845, 2 Broun, 465 (as to this last case, see below).

See, however, *Stuart*, 1836, 14 S. 836, and Burnett, 438, noting *Kinloch's* case). In England, this view has received effect in the case of an interpreter (Taylor, s. 920). This protection does not extend to reports by medical advisers to insurance companies (*M'Donald*, 1881, 8 R. 357); or to communications with men of business, not lawyers, *e.g.* factors (*Mitchell*, 1843, 7 D. 382), bankers (*Loyd*, 2 Car. & P. 329), and accountants (*Wright*, 1831, 10 S. 139): or made to a lawyer not employed professionally (*Greenough, ut supra*, per Ld. Chan. Brougham; *Davie*, 1881, 4 Coup. 450); or to a non-professional person, employed as a law agent (*Stuart, ut supra*). Except, perhaps, in reference to impending criminal proceedings (*Gavin*, 1830, 9 S. 213; *Hope, ut supra*: see *Stuart, ut supra*. Macdonald observes (p. 459, note 3) that no absolute rule can be laid down). Information acquired by a counsel or law agent, not in the course of his employment, but from independent sources, is not privileged (Hume, ii. 350; Burnett, 435; More, *Notes*, 415; *Wamphray's Crs.*, 1675, M. 347; *E. of Northesk*, 1680, M. 353; *D. of Roxburghe*, 1753, Elch. "Witness," No. 37). The privilege is the client's, not the agent's. The latter is bound to respect it (Bell, *Prin.* s. 2254; *Hyslop* and *Wight, ut supra*; *Kerr*, 1822, 3 Murray, 141; *Edwards*, 1823, 3 Murray, 371). A like principle applies as between a trustee and the agent to the trust, in a question between the former and the beneficiaries (*Provan*, 1830, 8 S. 797). It may be ended by waiver, express or implied (*Forteith*, 1821, 2 Murray, 467; *Noble*, 1843, 5 D. 723), *e.g.* where the client calls his agent as a witness (15 Vict. c. 27, s. 1; cf. *Forteith, ut supra*). Refusal to waive it raises no adverse presumption (*Wentworth*, 10 H. L. C. 589). As to the application of the rule where a law agent acts for two parties in the same transaction, see *D. of Hamilton*, 25 May 1819, F. C.; *Kid*, 1842, 5 D. 193; *Boyle*, 1844, 6 D. 682; Taylor, s. 926. The privilege is subject to exceptions: (1) Where the legal adviser is examined as a haver in an action of exhibition or under a commission and diligence, he is bound to answer questions (*Kirkwood*, 1627, M. 342; *Rollocks*, 1666, M. 344; *Bathgate*, 1666, 1 Bro. Supp. 521; *Scott*, 1737, M. 358, Elch. "Witness," No. 7; 1749, 1 Pat. App. 441; cf. *Wamphray's Crs.*, 1675, M. 347, as to a counsel's deposition in an action of proving of the tenor), or produce documents (*Campbell*, 1823, 2 S. 139; *Fisher*, 1827, 6 S. 330), whenever his client would have been similarly bound. (2) Communications between a legal adviser and his client regarding a transaction entered into by the former for the latter in the course of legal proceedings, *e.g.* the compromise of an action, are admissible in order to prove the former's authority and the terms of the transaction (*Jaffray*, 1835, 13 S. 1112; *Kid*, 1842, 5 D. 193). Similarly, commission has been granted to recover correspondence between defenders and their law agent in order to show that the pursuer's claim was intimated to the defenders, and that they knew of it (*Anderson*, 1859, 21 D. 654). (3) The protection does not secure fraudulent transactions from disclosure, nor does it extend to consultations with a legal adviser with a view to the commission of fraud or crime (Burnett, 435 *et seq.*; *M'Leod*, 1744, M. 16754, Elch. "Witness," No. 26; *Keith*, 1684, M. 354; *M'Lean*, 1838, 2 Swin. 183; *Humphreys*, 1839, Swinton's Rep.; *Kid, ut supra*: *Inglis*, 1843, 5 D. 1029; *Millar*, 1856, 19 D. 142; cf. *Jarvis*, 1841, 3 D. 990, and *Munro*, 1858, 21 D. 103). As to the application of the principle in transactions struck at by the Act 1621, c. 18, see *M'Cowan*, 1852, 15 D. 229, 494; Dickson, s. 1679. (4) Under the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79, ss. 90, 91), and the Bankrupty and Cessio Act, 1881 (44 & 45 Vict. c. 22, s. 10; see also 43 & 44 Vict. c. 34, s. 9 (2)), the bankrupt's law agent (see *Paul*, 1855, 17 D. 457; *A. B.* v. *Binny*, 1858, 20 D. 1058) may be examined,

and is bound to answer all lawful questions regarding the estate or affairs of the bankrupt (*Sawers*, 1858, 21 D. 153; *Tod's Tr.*, 1872, 10 M. 980).

3. *Communications made to a Spiritual or Medical Adviser.*—The question whether confessions made to a clergyman are privileged has not been made the subject of express decision in Scotland (Hume, ii. 335, 350; 2 Al. 471, 537, 586; cf. *Ross*, 1859, 3 Irv. 434; *M'Laughlin*, 1863, 4 Irv. 275). In a very special case (*Hope*, 1845, 2 Broun, 465), a confession made to a jailer, who had constituted himself the legal and spiritual adviser of the prisoner, and had been the medium of communication between her and her friends regarding her defence, was held to be privileged. In England, it has been ruled that they are not protected (*Gilham*, 1 Moo. P. C. C. 186; see, however, Best, s. 583 *et seq.*). At the same time, eminent judges have indicated that they would not enforce the strict letter of the law (*Du Barré*, 1 Pea. 77, per Ld. Kenyon; *Broad*, 3 C. & P. 518, per Best, C. J.; *Griffin*, 6 Cox, Cr. Ca. 219, per Alderson, B. Cf. *Hay*, 2 F. & F. 4, per Hill, J. See also Taylor, s. 916, note 6).

Communications made to a medical adviser, even in the strictest professional confidence, have been held not to be privileged (Hume, ii. 350; Burnett, 438; 2 Al. 470; Tait, 387; *D. of Kingston*, 1776, 20 St. Tri. 572; *A. B.*, 1857, 14 D. 177).

4. *Communications between Husband and Wife.*—Such communications are privileged (16 Viet. c. 20, s. 3; see Fraser, *H & W.* ii. 1150; Taylor, s. 909 A.); and it is thought that, notwithstanding the limitation in the Statute to such matters as are communicated "during the marriage," the privilege subsists after the dissolution of the marriage by death or divorce (*Monroe*, Peak. Ad. Cas. 221, as explained by Ld. Ellenborough in *Aveson*, 6 East, 192, and as confirmed in *O'Connor*, 4 Man. & G. 435; see *Best*, 58 S. 586). A bankrupt's wife may be examined on matters relating to his estate (19 & 20 Viet. c. 79, s. 90; *Sawers*, 1858, 21 D. 153). It has not been settled in England to what communications made during marriage the privilege extends (Taylor, s. 910, citing *Commonwealth* v. *Sapp*, 29 Am. St. R. 405, where the whole subject is discussed).

5. *Communications between Public Officials.*—Secrets of State and all communications between Government and its officers are protected from disclosure on grounds of public policy (Best, s. 578). It has been held in England that, in a public prosecution, a witness cannot be asked to disclose whether he was the informer, or who the informer was, unless, in the opinion of the presiding judge, such disclosure is necessary to establish the innocence of the accused (*Marks*, L. R. [1890], 25 Q. B. D. 494; see also *Hardy*, 24 How. St. Tr. 704; *Watson*, 32, *ib.* 82; *Briant*, 15 M. & W. 169). The Scots rule appears to be that the Lord Advocate is, except in prosecutions for treason, and for offences against the revenue laws, compellable to disclose the name of his informer, and to produce his information. Where, however, he declares that such disclosure would, in the particular case, be prejudicial to the public interest, the Court will refuse to allow it (Hume, ii. 134; *Henderson*, 1853, 15 D. 292; cf. *Arthur*, 1895, 22 R. 417, and *Earl*, 1822, 1 Sh. App. 237, per Ld. Chan. Eldon). The privilege protects investigations at the Crown's instance with a view to criminal proceedings (*Hastings*, 1890, 18 R. 244; *Halcrow*, 1892, 20 R. 216; *Arthur*, *ut supra*). It is subject to exception in a case of "great and overwhelming necessity" (*Donald*, 1844, 6 D. 1255; *Arthur*, *ut supra*). A person who *bonâ fide* makes an unfounded complaint is sufficiently protected by the issue which the person suing him must take (*Arbuckle*, 1815, 3 Dow, 160; *Henderson*, *ut supra*).

On the same grounds, the evidence of jurymen, after their discharge, is

regarded as inadmissible to show that the verdict does not correctly represent the result at which the jury arrived (*Pirie*, 1890, 17 R. 1157; Hume, ii. 429; Dickson, ss. 1642–44; Taylor, s. 944). It seems that they are competent witnesses as ordinary observers of what happened during the trial (Dickson, s. 1645). Hume doubts whether their evidence is admissible as to an averment that the Clerk of Court had made a material error in recording the verdict (Hume, ii. 430; Dickson, s. 1646).

The privilege does not extend to a clerk to the Property Tax Commissioners, notwithstanding the terms of his oath (*Lee*, 3 Camp. 337).

A member or officer of either House of Parliament, or a shorthand writer employed therein, cannot, without permission of the House, be forced to disclose what took place within its walls (Taylor, s. 946; *Plunkett*, 29 How. St. Pr. 71; *Chubb*, 3 C. & K. 75).

Under State secrets are included State papers, *e.g.* treaties with foreign powers, official communications between the heads of public departments, etc. (*Beatson*, 5 H. & N. 838; Taylor, s. 947). The privilege covers such documents as the report of a Government inspector (*Sturrock*, 1849, 12 D. 166; cf. *Gibson*, 1896, 33 S. L. R. 638), the instructions issued by the Inland Revenue to their officers (*Tierney*, 1896, 23 R. 512), and even to a letter containing a character written to a public department (unreported case cited by Taylor, s. 947). Further, it applies to official communications between public officers regarding the conduct of their subordinates (*Wyatt*, Holt, N. P. C. 299; *Cooks*, 2 Stark. 183; *Greig*, 1826, 4 Murray, 70; cf. *Gibson*, 1822, 3 Murray, 220; *Edwards*, 1823, 3 Murray, 369), *e.g.* to the correspondence between the East India Company and the Board of Control (*Smith*, 1 Phil. 50; *Rajah of Coorg*, 29 Beav. 300), the report of a military commission (*Home*, 2 B. &. B. 130), and the minutes of the Board of Excise (*Young & Co.*, 27 Feb. 1816, F. C.; see also *Leven*, 1818, 1 Murray, 356; 1822, 1 Sh. App. 179, commented upon in *Earl*, 1822, 1 Sh. App. 229, per Ld. Chan. Eldon).

According to a recent judgment of the Court of Appeal in England (*Hughes*, 9 T. L. R. 92), the Court will not enforce production of a document owned by, or in the custody of, the department of a Minister of State or public official, if he claim the privilege (see *Arthur*, 1895, 22 R. 417; *Earl, ut supra*). It may be that if he did not himself attend the trial, but sent a subordinate with the papers, the judge would himself decide the question of privilege (*Beatson*, 5 H. & N. 838; see also *Dickson*, 1 F. & F. 425, commented upon in *Dawkins*, L. R. 8 Q. B. 272; Taylor, s. 947). The privilege, as resting upon reasons of public policy, cannot be waived by the witness or haver (*Arthur* and *Earl, ut supra*; see also *Little*, 1847, 9 D. 737, per L. J. C. Hope and Ld. Cockburn on the question of enforcing the rule even in face of waiver by a public official).

It is in accordance with the principle of the rule that secondary evidence of a document entitled to the privilege is inadmissible to prove its contents (*Craig*, 1823, 3 Murray, 347; Taylor, s. 948).

[Tait, 384 *et seq.*; Dickson on *Evidence*, ss. 1642–89; Kirkpatrick, *Digest*, ss. 172, 182; Taylor on *Evidence*, 9th ed., ss. 908–48; Best on *Evidence*, 7th ed., ss. 578–86; Stephen, *Digest*, 5th ed., art. 110 *et seq.*]

See Books; Commission, Proof by; Evidence; Witness.

Confirmation by a Superior.—*Introductory.*—This subject is now largely of historical interest only, but a knowledge of it is necessary to the proper understanding of the 4th section of the Convey-

ancing (Scotland) Act, 1874. The features of the Scots system of land-rights were that the sovereign was vested with the character of original and supreme proprietor of the land; that he from time to time made grants to subjects as vassals; and that these vassals gave subordinate rights to others, thereby becoming subject-superiors, with the grantees as vassals, who might also, in turn, constitute further subaltern relationships of superior and vassal. The condition, or *reddendo* or *faciendo*, of all grants, where not expressed, was military service; the position of superior and vassal was not affected by subinfeudation, and each superior in turn was entitled to exact the services from his immediate vassal, and was accordingly entitled to have a vassal who could perform them; but at a very early period in the history of the system the superior became bound to enter the heir, subject to the payment or exaction of certain *casualties*. He was not, however, bound to enter a stranger, and in this he was protected by the casualty of *recognition* declared by the Act David II. c. 34, which was the total forfeiture of the feu to the superior in the event of the vassal alienating more than half the feu to a stranger (*i.e.* anyone other than the heir at law, or heir under an enfranchised destination) without the consent of the superior.

The same principles applied to *blench* holdings. Charters of confirmation were frequently granted in favour of burghs, confirming the grants previously made, but confirmation in the sense used in this article had no place in burgage holdings. See ALLODIAL; BLENCH; BURGAGE; FEUDAL SYSTEM, etc.

Superiors continued, notwithstanding the introduction of a *reddendo* of agricultural and other services and payments and of blench holdings, to exercise their right of refusing consent to the substitution of new in place of old vassals; but after a time it became usual to receive the new vassal, or "singular successor," on payment of a fine. By an Act of Alexander II. (Thomson's *Acts*, i. 371), power was given to the Sheriff to sell a debtor's lands, the purchaser to hold of the Crown or subject-superior in the same manner as the debtor had done, the superior, however, having a right of pre-emption. An Act of 1469 (c. 3) introduced apprisings, and provided that the over-lord (superior) should receive the appriser as tenant (vassal) on payment of a year's rent: the Act of 1672 (c. 19) also placed adjudgers in this position, and that of 1681 (c. 17) extended the right to purchasers at judicial sales. These enactments did not, however, apply to the ordinary purchaser, who, while his right remained unrecognised by the superior, was exposed to the risk of a second conveyance by the seller, and other contingencies. With a view to the purchaser's safety, the practice was introduced of having two separate dispositions, or charters, by a seller to a purchaser, one with a holding *a me de superiore meo* and the other with a *de me* holding, the latter being intended merely as a temporary title. On these an indefinite sasine was expede, which, when ascribed to the *de me* conveyance, gave the disponee a valid title to the *dominium utile*, holding of the disponer as superior, and the right of property was thus safe. When the right was afterwards recognised by the superior by confirmation, the *de me* charter was dropped out of the progress. Had both rights been completed separately, there would have been two estates, one of property and another of superiority, requiring consolidation. After a time (about the year 1600) only one conveyance came to be granted, containing an obligation to infeft *a me de superiore meo vel de me*, or, as it was subsequently expressed, *a me vel de me*. Infeftment was taken on the indefinite precept of sasine in like manner, and this constituted a valid *base* right in the person of the disponee as from

the date of the infeftment. When confirmation was obtained, the right was rendered *public* and equivalent to an infeftment on a precept granted by the superior himself. Down to the year 1747 (when the Act after mentioned was passed), however, the ordinary disponee had no direct remedy in the event of the superior refusing an entry. An alternative holding was not a contravention of a prohibition against subinfeudation (*Colquhoun*, 1867, 5 Macp. 773). Such a holding was, however, sometimes expressly prohibited by the feu-right.

Charter of Confirmation.—History.—The original purpose of this charter was that sovereigns, barons, and prelates might ratify the grants of their predecessors. Subsequently it was used to express the superior's consent to subinfeudation, so as to prevent forfeiture of the rights of subvassals on the forfeiture of the original grant. More recently the purpose was to dissolve the relation of the vassal to his superior, and to recognise the new vassal in his place. The charter was of very ancient origin, and a form is given in the Styles of Marculfus (*circa*, 660). Examples of it amongst us, applied to its original purpose, will be found in the registers of the religious houses (*e.g.* Confirmation Charter of David I. to Abbey of Dunfermline, 1127–9, Reg. de Dunf. p. 3–4).

Form.—The deed ratified and confirmed the right granted to the purchaser or other disponee, and the sasine following on it. In its original form it confirmed the lands; then it became the practice to engross at length in the charter the writs confirmed; and subsequently to narrate the various conveyances and infeftments, and specially confirm them, declaring the confirmation to be as effectual as if the whole writs had been verbatim inserted in the charter.

Acts of 1847.—By the Lands Transference Act of this year, sec. 6, it was provided that a person duly infeft under a title capable of being made public by confirmation, should be entitled to compel entry in this manner by the form of process therein provided for. The vassal had to show the terms of the holding, and to pay or tender the duties or casualties. The superior was entitled to insert clauses of *tenendas* and *reddendo* and the conditions, etc., unless these were specified or duly referred to in the sasine; but if so specified or referred to, these were not to be inserted at length without the vassal's consent. Sec. 7 provided that the charter should confirm the lands therein contained themselves and the sasine in favour of the person receiving the charter, and that it might be expressed in the form of Schedule D; and further, that in whatever *habile* form expressed, it should be held to confirm in favour of such person the whole dispositions, sasines, etc., necessary to be confirmed, although not enumerated. The Act also contained provisions (s. 8), where the superior's title was incomplete, for the vassal applying to the Lord Ordinary on the Bills to ordain the superior to complete his title and grant an entry, under pain (where the *reddendo* did not exceed £5) of forfeiture; or (s. 9) to authorise an application to the Crown, prince, or mediate superior, for an entry as in vice of the immediate superior, so long (s. 10) as the latter remained unentered, and thereafter until a new entry in favour of the vassal or his successors should be requisite. There were also provisions for the relinquishment of the superiority; and that the over-superior's rights were not to be affected or extended, etc. (s. 11 *et seq.*).

The Crown Charters Act of 1847 contained provisions as to the mode of obtaining Crown charters. It provided (s. 21) for charters of confirmation being granted, combined with precepts for infefting the heir; for the charters (s. 25) being in the English language; and for conditions, etc.,

being referred to (ss. 26, 27); and forms of charters of confirmation were contained in Schedule C, 2 and 3.

Effect of Confirmation.—Confirmation of a *de me* infeftment protected the sub-vassal from the forfeiture of his feu on his immediate superior incurring the casualty of recognition or other forfeiture of his right, but it did not raise the sub-vassal into the position of vassal. Confirmation of an *a me* infeftment, on the other hand, completely divested the former vassal; operated, in the absence of reservation, a discharge of all by-past casualties and duties (*Tailors of Glasgow*, 1831, 13 D. 1073); and invested the new vassal in the full right and place of vassal, with his obligations. The confirmation, assuming that there was no mid-impediment, operated *retro*, so that the infeftments confirmed were rendered as effectual from their date as if they had proceeded on the superior's precept, and that although a person whose infeftment was confirmed had died before the confirmation (*M'Dowall*, 1793, Mor. 8807; *Lockhart*, 1837, 16 S. 76). The *de me* holding was completely evacuated. A *mid-impediment*, however, prevented confirmation so operating. Thus, if two persons onerously and in good faith acquired the same lands, the one who first obtained infeftment, assuming that subinfeudation was not prohibited, was preferable as regards the property, and held the same (*de me*) of the disponer; but as regards the right held of the disponer's superior (*a me*), the first infeftment confirmed, although last in date, was preferable to the other (1578, c. 66; Ersk. ii. 7. 14). In these circumstances the first confirmed infeftment operated as an impediment to the confirmation of the second (*Gardner*, 1839, 2 D. 185; revd. 1843, 2 Bell's App. 129). No mid-impediment was, however, created by the mere infeftment until the superior intervened. Nor was a mid-impediment created by the superior granting a precept of *clare constat* in favour of the heir of the disponer. The heir was *eadem persona cum defuncto*: and the disponee could at any time supersede him, as he could the ancestor. The precept of *clare constat* could only take up the superiority left in the ancestor, and that right had been evacuated by the confirmation of the disponee's infeftment (*Fullerton*, 1833, 12 S. 117). If, however, the holding was *a me* only, an infeftment carried nothing until confirmed, and, in case of double conveyances, both containing *a me* holdings, the infeftment first confirmed carried the *plenum dominium* (*Rowand*, 1824, 3 S. 196; 1827, 5 S. 903; affd. 1830, 4 W. & S. 177). In competition of rights completed by confirmation, the preference depended, in the case of Crown holdings previous to 1858, on the date of sealing, and subsequently on the date of the charter; and in holdings of subject-superiors, on the date of delivery of the charter, subject to the provision of the Titles Act of 1860, after referred to.

Confirmation and Resignation.—A title was frequently completed by a charter of resignation and confirmation, and, in doing so, errors were occasionally committed which voided the charter and the infeftment following thereon. Thus A., publicly infeft, disponed to B., who took infeftment on A.'s precept, and disponed to C. C. resigned on A.'s unexecuted procuratory, and obtained from the superior a charter confirming B.'s base infeftment, and of resignation. The charter was null as regards the resignation, because B.'s base infeftment was rendered public by the confirmation, and A. was thereby totally divested both of property and superiority, leaving nothing to resign on his procuratory. The proper method was to infeft C. on B.'s precept, and confirm the two dispositions and sasines (or, subsequent to 1847, the lands and the last sasine), or to resign on B.'s procuratory after his infeftment was confirmed. The confirmation in all cases properly terminated with the sasine

in favour of the granter of the procuratory on which it was desired to resign.

Writ of Confirmation.—Act of 1858.—The Titles to Land Act of this year, while it did not abolish instruments of sasine, rendered them no longer necessary, introduced the recording of the dispositions, etc., or notarial instruments (ss. 1 and 2), and provided for a writ of confirmation in the form prescribed (Schedule E) being written on the recorded deed, sasine, or notarial instrument, which confirmation was declared by the Act to be in all respects as effectual as a charter of confirmation. Sec. 6 was applicable to Crown holdings, and sec. 7 to lands held of subject-superiors. The vassal required to pay or tender the proper duties and casualties, and, in the case of lands held of a subject-superior, produce a charter showing the *tenendas* and *reddendo*. Sec. 10 provided for a reference to the *tenendas* and *reddendo* in charters by progress. The charter of confirmation was not, however, abolished. Where the investiture imposed, or should thereafter impose, a prohibition against subinfeudation, or an alternative holding, this was not affected by the Act (s. 28).

Act of 1860.—The Titles Act of this year (s. 36) provided that where the investiture contained such a prohibition, the conveyance or instrument should, if an entry was expede within twelve months of the date of such conveyance or instrument, have the same preference from the date of recording the conveyance or instrument as if the same contained an *a me vel de me* holding, and the investiture contained no such prohibition.

Act of 1868.—The Titles to Land Consolidation Act, 1868, practically re-enacted the various provisions just referred to. In particular, by secs. 82 and 83 it re-enacted the provisions as to writs of confirmation, and it provided in Schedules T, Nos. 3 and 4, forms of a writ and of a charter of confirmation. By sec. 6 the provision of the Act of 1860 above mentioned was re-enacted.

Act of 1874 (s. 4).—*Abolition of the Renewal of Investiture.*—The enactments of the Act of 1868, so far as relating to the charter or writ of confirmation, are impliedly revoked[1] by this section of the Conveyancing Act, 1874, which provides that where lands (which, under the interpretation clause, include, briefly stated, all heritable property) have been feued, whether before or after the commencement of the Act, it shall not (subs. 1), notwithstanding any provision in any statute or deed, be necessary, in order to the completion of the title of any person having a right, whether by succession, bequest, gift, or conveyance (including decree, etc.), that he shall obtain from the superior (including the Crown, prince, mid-superior) any charter, precept, or other writ by progress, and it shall not be competent for the superior to grant any such writ; it being, however, provided that the Act shall not prevent the granting of charters of novodamus, precepts or writs from Chancery, or of *clare constat*, or writs of acknowledgment. Some doubt was expressed (Mowbray's *Analysis*, p. 13) as to the meaning of "precepts or writs from Chancery," but it is clearly settled by practice that the Crown is in the same position as a subject-superior.

Infeftment to imply Entry with Superior (subs. 2).—This subsection provides that every proprietor who was at the commencement of the Act, or shall thereafter be, duly infeft in the lands, shall be deemed and held to be as at the date of the registration of such infeftment in the appropriate register of sasines, duly entered with the nearest superior, whose estate of superiority is, according to the previously existing law, not defeasible at the will

[1] And expressly revoked by the Statute Law Revision Act of 1893.

of the proprietor so infeft, to the same effect as if the superior had granted a writ of confirmation, and that whether the superior's title, or that of any over-superior, is complete or not; but such implied entry shall not confer or confirm any rights more extensive than those in the original charter or feu-right, or in the last charter or writ. The subsection contains several further provisions protecting the rights of parties, *e.g.* it provides that it shall not validate subinfeudation where it has been effectually prohibited; and that the previously entered vassal shall continue personally liable for the feu-duty and other obligations until notice of change of ownership is given, as therein provided for.

Implied Entry not to affect or extend the Rights of Superiors (subs. 3).—This subsection provides that such implied entry shall not prejudice the right of the superior to any casualties, feu-duties, or arrears of feu-duties, due at or prior to the date of such entry; and the rights and remedies of the superior, at law, or under the feu-right, for recovering and making effectual such casualties, feu-duties, and arrears, or for irritating the feu *ob non solutum canonem*, and all the obligations and conditions in the feu-rights exigible by the superior, in so far as these may not have ceased to be operative in consequence of the Act or otherwise, shall continue to be available; but such implied entry shall not entitle any superior to any casualty sooner than he could by the law, prior to the Act, or by the conditions of the feu-right, have required the vassal to enter, or pay such casualty irrespective of his entering. Conditions made *after* the commencement of the Act, prohibiting subinfeudation, or against an alternative manner of holding, are null (s. 22).

It is probable that a receipt, without reservation, granted by a superior to an impliedly entered vassal for composition or relief duty, will be held to operate a discharge of all by-past casualties and duties, on the principle of the case of *Tailors of Glasgow*, above cited.

[Ross, *Lect.* ii. p. 215 *et seq.*; Menzies, p. 609, 629 *et seq.*; Bell, *Lect.* p. 731 *et seq.*; and Acts and authorities above cited.]

Confirmation of Executors.—Erskine defines the confirmation of an executor as "a sentence of the judge competent, authorising an executor, one or more, upon making inventory of the moveable estate, and debts due to the deceased, to sue for, recover, possess, and administer the whole, either for behoof of themselves, or of others interested therein. Where an executor named by the deceased is authorised by the judge, it is called *the confirmation of a testament-testamentary*: and when the judge confers the office of executor upon a person of his own nomination, it is styled *the confirmation of a testament-dative*" (iii. 9. 27). The confirmation of an executor is the ratification of his appointment; the appointment itself is made either by the deceased, as in the case of an *executor-nominate*, or by decree of the Court in favour of the person or persons entitled to the office, as in the case of an *executor-dative*. The effect of confirmation is to give the executor confirmed a title to uplift and administer the moveable estate of the deceased as given up in the inventory upon which the confirmation proceeds. Prior to the Statute 4 Geo. IV. c. 98, confirmation was necessary to vest the estate of a deceased intestate in his next of kin.

Who may Apply for Confirmation.—(1) *Executor-Nominate.*—A person who is nominated as executor by the deceased in a valid testamentary writing has the first right to be confirmed as executor, the Sheriff, as Commissary, being judge of the formal validity of the deed. Where a

testator has appointed certain persons to be his trustees, without expressly nominating them his executors, they are entitled to confirmation as executors-nominate, if the general tenor of the deed shows it to have been the testator's intention that they should administer the estate and perform the functions of executors (*Martin*, 1892, 19 R. 474). But nomination as trustees does not necessarily infer nomination as executors, and a testator may appoint a different person to be his executor from those whom he nominates as his trustees (see *Martin, ut supra*). Where a testator had appointed certain persons as "trustees and executors," and afterwards by a codicil appointed another as "trustee" in the place of one who had died, it was held that the latter was entitled to confirmation as executor along with the others (see *Buchan*, 1879, 6 R. 569, 6 R. (H. L.) 44). A nomination as "judicial factor to carry out the purposes of this trust," or a grant of "power to see the will executed," is sufficient to confer a right to confirmation as executor-nominate (*Tod*, 1890, 18 R. 152; *Dundas*, 1837, 15 S. 427). It is not necessary that the executor-nominate should be mentioned by name in the will, so long as he is sufficiently designed to make his identification possible. Thus the holder of a particular office may be nominated. So also the right to the office may be conferred by the testator upon a class of persons, such as his "children" or his "next of kin." In such a case, those members of the class who ask for confirmation must be able to account for the absence of the others, by producing evidence that they have declined the office, or are otherwise incapable of performing the duties. A testator can empower someone else, *e.g.* a beneficiary, to nominate executors, or can nominate one executor with power to him to name another: and assumed trustees, or trustees appointed by the Court under the Trusts Act of 1867, are entitled to confirmation along with the original trustees.

(2) *Executor-Dative.*—Where there is no executor-nominate, or where the executor-nominate has failed or has declined to come forward for confirmation, the office may be conferred by the Sheriff, as Commissary, upon one or more of the following persons in their order: (*a*) The universal disponee, who takes under a general disposition and settlement; (*b*) the next of kin of the deceased; (*c*) the relict; (*d*) creditors of the deceased; (*e*) a legatee. The last two classes follow the others, as acting only for their own interest and not for behoof of all concerned. At one time it was customary for the procurator-fiscal to apply for the appointment when none of those entitled to it came forward; but now the usual practice in such circumstances is the appointment of a judicial factor by the Court to administer the estate, upon the petition of anyone interested in the executry. The consul of any foreign State may apply for power to administer the property of any subject of that State who has died in this country, leaving no one here who is entitled to administer it. The power granted to such consul may be "limited in such manner and for such time as to the Court shall seem fit" (24 & 25 Vict. c. 121, s. 4). Formerly the next of kin of the deceased had the first claim to the office of executor, even though he had no beneficial interest in the estate, but now he cannot compete with a general disponee (*Crawford*, 1755, Mor. 3818). The gift of a liferent of the whole estate does not put the donee in the position of a general disponee (see *M'Gown*, 1835, 14 S. 105). But the want of a beneficial interest does not disqualify the next of kin for the office, in the absence of competition by anyone having a better claim (*Bones*, 1866, 5 M. 240). The whole next of kin have a right to be confirmed as joint executors, and, by the Intestate Moveable Succession Act of 1855 (18 Vict.

c. 23, s. 1), the children of a predeceasing next of kin may be confirmed when none of the next of kin compete for the office. The father of a deceased intestate, taking an interest in the succession under the Act of 1855, is entitled to be conjoined with the next of kin in the office of executor (*Webster*, 1878, 6 R. 102). The mother of a deceased intestate, though not entitled to compete with the next of kin, may obtain confirmation in the absence of anyone having a preferable title (*Muir*, 1876, 4 R. 74). A surviving husband or wife has an interest in the predeceasing spouse's estate which is sufficient to enable him or her to obtain confirmation, but not in competition with the next of kin, whose right is preferable (*Stewart*, 1890, 17 R. 707; *Campbell*, 1892, 19 R. 563). The domicile of the deceased decides the question who is the next of kin (see *Hastings*, 1852, 14 D. 489; also *Whiffen*, 1872, 10 M. 797). The moveable estate of a deceased intestate vests in his next of kin by mere survivance, even if they die before confirmation (4 Geo. IV. c. 98, s. 1); and the right thus vested can be assigned, giving the assignee a title to be conjoined as executor-dative with the next of kin of the deceased (*Webster*, 1878, 6 R. 102). The assignee of a legatee has also an interest which will entitle him to confirmation (*Macpherson*, 1855, 17 D. 358). Under the Act of Sederunt, 13 Feb. 1730, an officer of the Court, such as a judicial factor or *curator bonis*, has a right to confirmation where his ward has a beneficial interest in the estate, but only when no one else who has a title to be confirmed comes forward (see *Martin*, 1892, 19 R. 474). Minors, or even pupils, may be confirmed or decerned executors, either in their own names or along with their tutors and curators (*Johnstone*, 1838, 16 S. 541).

Procedure in Confirmation.—The cases of an executor-nominate and an executor-dative differ in two respects. The executor-nominate is appointed by the deed of the testator, and only requires the ratification of his appointment by the Commissary judge, while the executor-dative is appointed by decree of the judge. The executor-dative also must find caution, while the executor-nominate need not.

The procedure in confirmation in either case is similar, though not identical. The judge before whom the proceedings are taken is now the Sheriff of the county in which the deceased was domiciled at the date of his death. By the Sheriff Courts Act of 1876 (39 & 40 Vict. c. 70, s. 35), the Commissary Courts in Scotland were abolished, and the whole powers and jurisdiction of the Commissary Court in each commissariot were transferred to the Sheriff as Commissary. Where the domicile of the deceased at the date of his death was out of Scotland, or where he had no fixed or known domicile, the application for confirmation must be made to the Commissary of Edinburgh.

An executor-nominate, who wishes confirmation, lodges with the Clerk of Court the deed which contains his nomination, together with any other testamentary writings which the deceased may have left dealing with his moveable estate. At the same time he lodges an inventory of the whole personal estate of the deceased wheresoever situated, and he makes oath or affirmation that these deeds are the only deeds, so far as known to him, which the deceased left, dealing with his personal estate, and that the inventory contains the whole personal estate so far as known to him. This oath or affirmation must be made before the Commissary or his depute, or the Commissary Clerk or his depute, or before any commissioner appointed by the Commissary, or before any magistrate or justice of the peace within the United Kingdom or the Colonies, or any British consul (21 & 22 Vict. c. 56, s. 11). The inventory, which must be written on an *ad valorem*

stamp, must include, for the purposes of the Stamp and Finance Acts, any moveable estate of which the deceased was at the date of his death competent to dispose (57 & 58 Vict. c. 30, ss. 2, 22 (2–a)); and also any money secured on heritable property in Scotland, or contained in bonds excluding executors, which last is moveable for the purposes of the Acts (23 Vict. c. 15, ss. 3, 4, 6; 23 & 24 Vict. c. 80, ss. 1–8). The Acts do not apply to feu duties and other permanent periodical payments which are made real burdens upon land, when payment of a capital sum of money is not thereby secured. (Forms of inventories are supplied by the Inland Revenue Department, and may be afterwards stamped.) See ESTATE DUTY. Property held in trust by the deceased does not fall to be included in the inventory. By the Customs and Inland Revenue Act of 1881 (44 Vict. c. 12, s. 28), it is competent for any person applying for probate or letters of administration in England or Ireland, or exhibiting an inventory in Scotland regarding the estate of a person domiciled in the United Kingdom, to state in his affidavit the fact of such domicile, and to deliver therewith, or to annex thereto, a schedule of the debts due by the deceased to persons resident in the United Kingdom, and of the funeral expenses; and in such a case, for the purposes of the duty to be charged, the aggregate amount of the debts and funeral expenses so set forth shall be deducted from the value of the estate as given in. The debts thus scheduled must be debts which are payable by law out of the estate contained in the inventory, and must not be voluntary debts due on the death of the deceased, or payable under any instrument which was not *bonâ fide* delivered to the donee twelve (44 & 45 Vict. c. 12, s. 38) months before death, or in respect of which any real estate may be primarily liable. No deduction is allowed for debts incurred by the deceased, or encumbrances (*i.e.* heritable securities or other debts or payments secured on heritage) made by him, unless such debts or encumbrances were incurred or created *bonâ fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit, and take effect out of his interest, nor for any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained, nor more than once for the same debt or encumbrance charged upon different portions of the estate (57 & 58 Vict. c. 30, s. 7, subs. 1). No deduction will be allowed in the first instance for debts due to persons resident outside the United Kingdom, unless they were contracted to be paid in the United Kingdom, or charged upon property situated therein, except out of the value of personal property of the deceased out of the United Kingdom in respect of which duty is paid. But the duty may be repaid if the commissioners are satisfied that the personal property of the deceased situated in the foreign country or British possession in which the creditor resides, is insufficient to meet the duty (57 & 58 Vict. c. 30, s. 7, subs. 2). When the testamentary deeds and the inventory have been lodged, and the oath or affirmation taken, the executor-nominate is entitled to confirmation, even though the deed from which he draws his title is under challenge for reduction (*Grahame*, 1822, 1 S. 362; *Hamilton*, 1888, 16 R. 192). The whole of the papers thus lodged are recorded in the books of the Court, and the Clerk of Court then seals, subscribes, and issues to the executor his confirmation, which gives him authority to administer the estate. This is known as a *testament-testamentar*. The Court will only interfere to prevent the confirmation of an executor-nominate where there appears to be a serious risk of the estate being dissipated or injured if it is allowed to get into his hands. In such a

case they will appoint a judicial factor, who must find caution (*Campbell*, 1895, 23 R. 90; see *Hamilton*, 1888, 16 R. 192, per Ld. M'Laren at p. 198).

The procedure to be adopted by a person desirous of being confirmed as executor-dative is regulated by the Confirmation and Probate Act of 1858 (21 & 22 Vict. c. 56), as amended by the Sheriff Courts Act of 1876 (39 & 40 Vict. c. 70). By the former of these Acts, the old process of raising edicts of executry is abolished, and for it is substituted the presentation of a petition to the Commissary. A form of the petition is given in Schedule A of the Act. It sets forth the date and place of the death of deceased, his domicile at the date of his death, and the relationship or title of the petitioner which gives him a right to apply for the appointment of executor, and closes with a prayer that he may be decerned executor-dative *qua* next of kin, or as the case may be. The petition is signed by the petitioner or his agent. When the petition is presented, it is intimated by being affixed by the Commissary Clerk to the door of the court-house, or some other conspicuous place in the court and the Clerk's office, and by the Keeper of the Record of Edictal Citations inserting the particulars thereof in a book kept by him for the purpose, and printing and publishing the same in the form of Schedule B annexed to the Act. When intimation and publication have been made, the Clerk signs a certificate to that effect upon the petition in the form "Intimated and published in terms of the Statute" (39 & 40 Vict. c. 70, s. 44). Nine days after the petition has been so certified, it may be called in Court, and the applicant may be decerned as executor-dative. The decree, which is known as a *decree-dative*, may be extracted three days later, after caution has been found.

The executor-dative then proceeds to apply for confirmation, by producing the extract decree, or by referring to it as recorded in the books of the Court, lodging the whole testamentary writings of the deceased, so far as dealing with his moveable estate, and also lodging an inventory and schedule of debts similar to those lodged by an executor-nominate, and making oath or affirmation thereto. The caution which the executor-dative is called upon to find is, by Statute, fixed at a sum not greater than the amount of the estate confirmed to (4 Geo. IV. c. 98, s. 2). The same Statute provides that executors-nominate shall not be required to find caution. On good cause shown, the caution of an executor-dative may be fixed at a lower sum than the amount of the estate confirmed to. The liability of the cautioner does not extend *ultra fines inventarii*. He must be resident in Scotland, or otherwise subject to the jurisdiction of the Scottish Courts, and must not be himself beneficially interested in the succession. It is contrary to the practice of the Court to accept a woman as cautioner (*French*, 1871, 9 M. 741). There does not seem to be any objection in principle to the acceptance of a limited company as cautioner for an executor-dative (see *M'Kinnon*, 1884, 12 R. 184; *Harley*, 1888, 25 S. L. R. 445).

Where the deceased has died possessed of personal estate in England or Ireland as well as in Scotland, the Act of 1858 provides a method by which the confirmation in Scotland, whether of an executor-nominate or an executor-dative, may be made effectual as regards the English or Irish estate. The fact that the deceased died domiciled in Scotland is set forth in the affidavit to the inventory, and is inserted in, or noted on, the confirmation by the Sheriff Clerk, and this insertion or note constitutes conclusive evidence of the fact of the domicile for the purposes of the Act (21 & 22 Vict. c. 56, ss. 15–17, as amended by 39 & 40 Vict. c. 70, s. 41;

but see *Hamilton*, 1888, 16 R. 192; *Hawarden*, 1861, 31 L. J., Prob. & Mat. 17. It is thought that there may be circumstances in which an inquiry into the fact of domicile would be allowed). In order to make the confirmation effectual as regards English or Irish estate, the inventory given in must include the English or Irish estate, the value of that estate being stated separately, and the duty paid must correspond with the total value of the estate. It is then only necessary, in order to constitute a title to the English or Irish estate, to produce the confirmation in the principal Court of Probate in England or in the Court of Probate in Dublin, and to deposit a copy thereof with the registrar, and to get the confirmation sealed with the seal of such English or Irish Court (21 & 22 Vict. c. 56, ss. 12 and 13). The Act declares that a confirmation so sealed shall have "the like force and effect" in England or Ireland "as if a probate or letters of administration, as the case may be, had been granted by" the Court in England or in Ireland. It should be noted, however, that when probate or letters of administration are granted in England, they place the validity of the will as a whole beyond doubt, though questions of construction are left open. But a deed in Scotland may be set aside after an executor has been confirmed, and a confirmation sealed by the English Court would not have "the like force and effect" as probate or letters of administration in this respect, for it would not be accepted as conclusive evidence of the validity of the testamentary writing. A similar privilege is given, by the 14th section of the Act, to the executors of persons dying domiciled in England or Ireland and leaving personal estate in Scotland. The probate or letters of administration granted in England or Ireland, and bearing in proper form that the deceased died domiciled in that country, must be produced in the Commissary Court in Edinburgh, and a copy thereof deposited with the Commissary Clerk, who thereupon endorses or writes upon such grant a certificate to the effect that the grant has been produced and the copy deposited. Such probate or letters of administration have then "the like force and effect" as if a confirmation had been granted in Scotland.

When the executor discovers, after confirmation, that there is some part of the deceased's estate which he has omitted to include in the inventory, he must, within two months of the discovery, lodge an additional inventory with the Commissary Clerk, setting forth the estate so discovered, and stating on oath that the additional inventory contains all that has been discovered. This is known as an eik to a confirmation. No new confirmation is necessary. So also where the value of some item in the original inventory has been understated, it may be necessary for the executor to eik to the confirmation the additional value of the asset as ultimately realised. If the asset has been actually reduced into possession, in spite of its under-value, the executor's title to it is good; but if it has not been reduced into possession, it is doubtful if the executor can claim more than the value at which it was estimated in the inventory. See EIK TO A CONFIRMATION.

Any person interested in the estate of the deceased, who is dissatisfied with the inventory given up by the executor who has been confirmed, on the ground that part of the estate has been omitted, or that the value has been under-estimated, may apply to have himself confirmed as executor to the deceased AD OMISSA VEL MALE APPRETIATA (*q.v.*).

Where an executor, who is either sole executor or the last survivor, and who is himself interested in the estate, dies after confirmation, but before he has reduced the whole estate into his possession, the estate, having vested in him, passes to his executors, and those interested in the estate of

the deceased testator have only a claim against his representatives for their share. By the modern practice, all executors-dative are held to have been confirmed for behoof of their own interests. But where an executor-nominate, who has himself no interest in the estate, is confirmed for behoof of others, the estate does not vest in him on confirmation, but only when it is actually reduced into possession. On his death, therefore, if he is sole executor or last surviving executor, before he has reduced the estate into possession, the confirmation lapses, and it is necessary for a new executor to be confirmed *ad non executa*. Where there is a substitute nominee in the original testament, no new decerniture as executor is necessary; but where there is no such substitute, the new executor must apply to be confirmed as executor-dative *ad non executa*, the procedure being the same as in an ordinary application to be confirmed executor-dative. The inventory to be lodged must contain only that part of the estate which has not been realised by the original executor. Where the estate has been realised by the original executor, though not distributed, confirmation *ad non executa* is not competent. The estate falls into the position of a lapsed trust, and those interested in the distribution of the estate may make good their claim by an action of declarator and adjudication, calling the heir of the deceased executor, and concluding that the estate should be adjudged to them.

An executor-creditor, who is entitled to confirmation upon the failure of an executor-nominate, or of those preferably entitled to confirmation as executors-dative, need not be confirmed to the whole estate, but may limit his confirmation to the amount of the debt due to him (4 Geo. IV. c. 98, s. 4). The procedure is the same as in the case of executors-dative, and caution must be found to the amount confirmed to. Notice must be given of the application in the *Edinburgh Gazette*, and any one having a preferable claim may lodge objections and exclude the creditor from the office. Any other creditor of the deceased is entitled to appear and claim to be conjoined as executor-creditor, if he can find no other funds to which he may be confirmed for satisfaction of his debt. In the event of his being conjoined in the office, he must pay his share of the expense incurred. The creditor, in order to expede confirmation as executor-creditor, must constitute his debt. A judgment of an English Court constituting the debt is sufficient (*Stiven* v. *Meyer*, 1868, 6 M. 370). Where there is no one against whom an action of constitution can be brought, the creditor may charge the deceased's next of kin to confirm within twenty days, which charge "shall be a passive title against the person so charged, as if he were a vitious intromettor, unless he renounce, and then the charger may proceed to have his debt constitute, and the *hæreditas jacens* of moveables declared lyable by a decreet *cognitionis causa*, upon the obtaining whereof he may be decerned executor-dative to the defunct, and so affect his moveables in the common form" (Act 1695, c. 41; see *Forrest*, 1863, 1 M. 806). An executor-creditor who is confirmed to more of the deceased's estate than the value of his debt, must account for the balance to those taking interest in the estate. It is competent for several creditors, either at the same time or successively, to be confirmed to the same part of the deceased's estate. Each confirmation creates a burden upon the estate to the extent of the debt due to the creditor who is confirmed, and, subject to that burden, the estate remains liable to be attached by other creditors (see *Smith*, 1862, 24 D. 1142).

If the next of kin of a deceased person "lyes out and doth not confirm," his creditors may come forward and claim to be confirmed as if they were creditors of the deceased (Act 1695, c. 41). But their diligence is post-

poned to that of real creditors of the deceased, done within a year and a day of their debtor's decease.

Estates under £500.—The Finance Act, 1894 (57 & 58 Vict. c. 30, s. 16) applies to estates, the gross value of which, without deducting debts and funeral expenses, does not exceed £500, the provisions of sec. 34 of the Customs and Inland Revenue Act of 1881 (44 Vict. c. 12), which was itself an extension of the Intestates' Widows and Children Act of 1875 and the Small Testate Estates Act of 1876. Confirmation may be obtained to such estates by the executor, in whatever capacity he may take the office, and wherever the domicile of the deceased may have been at the date of his death, upon payment of reduced fees. Where the gross value of the estate does not exceed £300, the fixed duty is thirty shillings; where it is over £300 and not more than £500, the fixed duty is fifty shillings. But by the Finance Act, 1896 (59 & 60 Vict. c. 28, s. 17), where the principal value of the estate (*i.e.* the value after deducting debts and funeral expenses) exceeds £100 and is less than £200, the duty is one pound.

Effect of Confirmation on Title to Sue.—The nomination of an executor in the testamentary writings, or his decerniture by the Commissary, gives him a title to sue for debts due to the deceased (*Bones*, 1866, 5 M. 240), but he is not entitled to extract decree, nor can he grant a valid discharge to the debtor until he has been confirmed. A debtor of the deceased is not therefore safe in paying his debt to the executor until confirmation has been expede (*Taylor*, 1830, 4 W. & S. 444; *Buchanan*, 1842, 5 D. 211; see *Hinton*, 1883, 10 R. 1110). By 22 Vict. c. 30, persons paying in reliance upon any instrument purporting to be a confirmation granted under the 1858 Act, or in reliance upon such an instrument which may be sealed with the seal of the English or Irish Court of Probate, or in reliance upon any instrument purporting to be a probate or letters of administration granted by the English or Irish Court, and having endorsed thereon a certificate by the Commissary Clerk of Edinburgh, "shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such confirmation, probate, or letters of administration."

Expenses of Confirmation.—The expenses of confirmation come off the whole head of the executry funds, and have a preference over the debts of the deceased (Ersk. iii. 9. 46; see *Moncrief*, 1713, Mor. 3945).

A calendar of all confirmations granted and inventories given in during the year in Scotland is published by the Commissary Clerk of Edinburgh at the end of each year, and a copy thereof is sent by him to every Sheriff Clerk in Scotland. This calendar may be inspected by anyone upon payment of a small fee (39 & 40 Vict. c. 70, s. 45).

[Ersk. iii. 9. 27; Stair, iii. 8. 54; Bell, *Prin.* s. 1888 *et seq*; Bell, *Convey.* ii. 1119; M'Laren, *Wills and Succession*, 870; Currie on *The Confirmation of Executors.*]

See Executor: Eik to a Confirmation; Ad omissa vel male appretiata: Inventory; Vitious Intromission.

Confirmation of Trustee in Sequestration.—See Act and Warrant.

Confiscation.—Confiscation or forfeiture of a man's estate, heritable or moveable, or both, is part of the punishment of certain crimes.

In Scotland, part of the penalty of treason is confiscation of all the convict's property, heritable and moveable, to the Crown (7 Anne, c. 21). In England, however, such forfeiture does not now follow on a conviction of treason or felony (33 & 34 Vict. c. 23).

Conviction of a capital crime entails confiscation of the convict's moveables. This is also part of the punishment of the crimes of bigamy, perjury, deforcement, and breach of arrestment. Forfeiture of moveables, or the single escheat, as it is called, also follows on a sentence of fugitation or outlawry; and if the outlaw remains a year in this condition, the superior takes the liferent escheat, *i.e.* the rents of the outlaw's heritage during his life, or so long as he remains a rebel. The vassal, however, in this case retains the fee, and may dispose of it, provided he does so without prejudicing the person entitled to the liferent escheat (*Macrae*, 1839, Macl. & R. 645).

Prior to 1748, confiscation of moveables was the penalty of being denounced a rebel, or being put to the horn for non-payment of a debt, or non-performance of a civil obligation. The liferent escheat was also forfeited to the superior, so long as the vassal remained a rebel. The Act abolishing ward-holding (20 Geo. II. c. 50) provided that single and liferent escheat should no longer follow horning and denunciation for civil debts and obligations.

[Mackenzie, *Inst.* ii. 5. 23; Stair, iii. 2. 15; Ersk. ii. 5. 53; Hume, i. 546; ii. 482.] See ATTAINDER; ESCHEAT; FORFEITURE.

Confusio.—Where a person becomes, whether by succession or by singular title, the true debtor and true creditor in the same obligation, the one relation cancels the other, and the obligation is *ipso jure* extinguished *confusione*. The scope of the principle is not limited to merely pecuniary obligations; more broadly stated, it may take effect wherever there is "a concourse of two qualities in the same subject which mutually destroy each other" (Pothier, by Evans, i. 425). The condition of the application of the rule, however, is *ipso jure* extinction. Accordingly, all cases of feudal rights are excluded from its operation (*Bald*, 1786, Mor. 15084). Upon this ground, it would appear that *confusio* cannot operate to extinguish ground-annuals, which are irredeemable rights in land constituted by infeftment (Ld. Kinnear, *Murray*, 1890, 18 R. 287, p. 288; but see Ld. Rutherfurd Clark, p. 290).

The principle takes effect where the debtor succeeds to the creditor, the creditor to the debtor, or a stranger to both: and to the extent of the debtor's interest (Ersk. iii. 4. 23; *Wright*, 1716, Mor. 5209; Ld. Neaves, *Love*, 1863, 2 M. p. 31). The better view seems to be that wherever true *confusio* operates, it operates to the complete *extinction* of obligations, not to their mere temporary *suspension* (Ld. Ivory, *Blantyre*, 1858, 20 D. p. 1196; Ld. Neaves, *Love*, *c.s.*): for those cases in which *confusio* is held to produce mere *suspension* will be found to be, not exceptions to the rule, but cases to which the principle does not apply. In this view it follows that where *confusio* applies, the debt falling by operation of law, no intention to maintain the debt as a separate estate by taking of conveyance or assignation thereto will avail (*Muir*, 1635, Mor. 831; *Codrington*, *c.i.*; *Murray*, *c.s.* p. 288; *Balfour-Melville's Tr.*, 1896, 4 S. L. T. No. 170).

On the other hand, where the rights of debtor and creditor apparently centre in the same person with the effect of merely *suspending* the obligation, it will be found either that there are two distinct legal characters or

personæ meeting temporarily in him, or that there coexist in his person adverse interests preventing the absolute identity of debtor and creditor, and which may thus exclude the operation of the principle (Ld. Corehouse, *Mackenzie*, 1838, 16 S. p. 324; L. J. C. Patton, *Fleming*, 1868, 6 M. p. 367). In this class of cases two courses are open to the creditor: (1) He may, being *in titulo* to do so, unconditionally discharge the debt, in which case the principle will be admitted, and will extinguish the obligation. (2) He may take an assignation or conveyance to the debt, in favour of himself, a trustee or third party, and thus maintain it as a separate right. In such cases, if the creditor's intention be ambiguous, the presumption is generally against *confusio* (Ld. Corehouse, *Mackenzie*, *v.s.*; see Rankine, *Landownership*, 622). Taking an assignation instead of a discharge is evidence for (*Fleming*, *v.s.*), as the abstaining from doing so may be evidence against an intention to keep up the debt. Retaining a bond undischarged is not sufficient evidence of such intention (see *Hogg*, 1832, 11 S. 199). As to whether the presumption differs in cases of succession as opposed to assignation *inter vivos*, see Ersk. iii. 4. 27, note *a*. The most ordinary examples of this duality of character or interest are cases where the debtor imperfectly represents the creditor, or *vice versâ*, *e.g.* heirs of entail; or where the obligation is accessory, and there is a right of relief over.

Where an heir of entail becomes full debtor or debtor without relief, as by incurring liability as universal representative of the entailer (*Codrington*, 1824, 2 Sh. App. 118. But see 37 & 38 Vict. c. 94, s. 12), or, being a creditor of the entailer, succeeds also to the debtor's unentailed estates (*Forbes*, 1802, M. App. *voce* Tailzie, No. 10), his predecessor's debts are extinguished *confusione* in his person, and cannot thereafter be made good against subsequent heirs of entail. No taking of assignation, or declaration of intention, however clear, can here oust the operation of the principle (*Codrington*, *v.s.*). On the other hand, where the heir in possession pays an entailer's debt, or where, being a creditor in debt affecting the entailed estate, he afterwards succeeds as heir of entail, he becomes fee-simple creditor in the debt, yet only represents the debtor in a limited character; accordingly, if he take a conveyance or assignation to the debt in favour of himself and his heirs whatsoever (*Crawford*, 11 Mar. 1809, F. C.), to a trustee (*Lawrie*, 1830, 9 S. 147), or to a third party (*Welsh*, 1837, 15 S. 537), the *jus exigendi*, although dormant during his life or during the coincidence of the lines of succession, may afterwards emerge and be made good against subsequent heirs of entail (*Crawford*, *v.s.*; *Gordon*, 1757, Mor. 3045, 11164: *Strathallan*, 1828, 6 S. 881, p. 883; see also *Cunninghame*, 1680, Mor. 3038; *Cuming*, 1726, Mor. 3042; affd. 1 Pat. 103; *Macalister*, 1865, 4 M. 245; cf. *Burnet*, 1756, 2 Pat. 122). On similar grounds, the operation of the principle was excluded where, under the former law, an apparent heir, or an heir liable *præceptione hereditatis*, bought in adjudications or debts affecting the ancestor's estate (*Murray*, 1728, Mor. 3043; *Burnet*, 1693, Mor. 3040). An unconditional discharge by the heir (*D. of Roxburgh*, 1825, 1 W. & S. 41), not accompanied by an assignation (*Ker*, 1728, Mor. 15551), will, however, as above explained, extinguish the debt *confusione*. The same principles would seem to apply in the case of permanent improvement expenditure chargeable against the entailed estate when paid by the heir in possession (*Temple*, 1706, Mor. 15355). This separation of character and interest, however, finds no place in the case of (1) the interest accruing from term to term upon the debt during the heir's possession (Ld. Ivory, *Blantyre*, *v.s.* p. 1195; Bell, *Convey*, i. 351); or (2) where the principal debt is redeemed, in whole or in part, from the rents of the entailed estate (*E. of Dalhousie*, 1713, M. 9992).

Where a principal debtor succeeds to his creditor, the principal obligation, and consequently also the accessory obligation, is extinguished *confusione*; the same result follows where the principal debtor succeeds to the cautioner who has paid the debt (see *Hart*, 1630, Mor. 5566). Where, however, the cautioner succeeds to the creditor, his accessory obligation alone is extinguished, and the cautioner may pursue the principal or co-cautioners upon the principal obligation.

So, if a creditor in a moveable debt succeed as heir in heritage to the debtor (*Johnston*, 1610, Mor. 3035), or the heir in heritage succeed to the creditor's debt by singular title, there is no proper *concursus debiti et crediti*, for the heir is only liable *subsidiarie*, the primary debtor being the executor. And conversely where an executor acquires right to an heritable debt. Where a debtor succeeds as next of kin to the creditor, or *vice versâ*, the point of time at which the concourse takes effect is the expiry of six months from the date of the defunct's death (*Elder*, 1859, 21 D. 1122). It would seem that sequestration or other diligence within the six months will have the effect of creating an impediment and prevent the operation of the principle (*Elder*, *v.s.*; see p. 1128).

See generally, Stair, i. 18, 9; More's Stair, cxxxvi; Bank. i. 24, 39; Ersk. *Inst.* iii. 4. 23–27; *Prin.* iii. 4. 10; Bell, *Prin.* s. 580; Bell, *Convey.* i. 350.

Where the holder of a heritable bond purchases the lands over which the security is constituted, being allowed the amount of the bond out of the price at settlement, the debt is extinguished *confusione*, even although the bond remain undischarged (*Hogg*, 1832, 11 S. 199). The same result follows where a heritable proprietor disburdens the property of securities, even although an assignation be taken to the debt (*Murray*, 1890, 18 R. 287; *Balfour-Melville's Trs.*, *v.s.*; cf. *Dennison*, 1873, 11 M. 392), or where an heir served to his ancestor buys up an adjudication during the legal (*Burnet*, 1693, Mor. 3040; see also *Ramsay*, 1729, Mor. 3383; *Robertson*, 1751, Mor. 3044; *Gordon*, 1750, Mor. 9597, at p. 9605). But adverse interests in the person of the creditor may prevent the application of the rule, and keep the debt alive as a separate estate (*Fleming*, 1868, 6 M. 363). Where there are postponed securities, if the debtor clears off prior charges by himself or by his agent, the debt cannot be kept up to the prejudice of postponed bondholders (see Cottenham, L. C., *Mackenzie*, 1839, Macl. & R. p. 123; *Love*, *v.s.* p. 31). On the other hand, where prior charges are retired by advances received from a third party, the latter is entitled to an assignation to the prior security, so as to maintain a preference over the postponed bondholders: and this being in substance a mere transfer of security from the old to the new lender, *confusio* does not apply (*Mackenzie*, 1837, 16 S. 311; affd. Macl. & R. 117). In such cases the presumption is that the prior charge is paid out of the new advances (*Mackenzie*, Macl. & R. 117; cf. *Gordon*, 1731, Mor. 11534; see Bell, *Prin.* s. 854).

Where a landlord purchases a lease or succeeds to the tenant, or where a tenant subsequently acquires the subject let in full property, each term's rent as it accrues is extinguished *confusione*, during unity of ownership (*Blantyre*, 1858, 20 D. 1188); similarly with other obligations *hinc inde* under the lease (Ld. Deas, *Blantyre*, *v.s.* p. 1200; Rankine, *Leases*, p. 472).

Servitudes are extinguished *confusione* where the same person becomes proprietor of the dominant and servient tenements (*Donaldson*, 1839, 1 D. 449; L. J. C. Hope, *Carnegie*, 1844, 6 D. 1381, p. 1390); the general rule being that no servitude can subsist in lands in which there is unity of ownership—*res sua nemini servit* (*Rentoun*, 1670, Mor. 3086; *Innes*, 1542, Mor.

3081. But cf. *Smith*, 1789, Mor. 16072; Gale, *Easements* (6th ed.), p. 502 *seq.*). Opinion differs as to whether a servitude thus extinguished requires constitution *de novo*, or may not *ipso facto* revive by subsequent separation of the dominant and servient tenements. Erskine's statement in favour of the former view (*Inst.* ii. 9. 37; but cf. ii. 9. 16) is too broadly stated, at least in cases where subsequent disunion independently of the will of the proprietor may be anticipated (Ld. Moncreiff, *Donaldson, v.s.* p. 452), *e.g.* in the case of lands held on different titles (*Preston's Trs.*, 1860, 22 S. 366), or destined to a different series of heirs (*Donaldson, v.s.*). In theory, doubtless, the servitude is *de jure* extinguished; but if it continue *de facto* (which in the case of most real servitudes, *e.g. oneris ferendi*, aqueduct, etc., will be sufficiently apparent), it will revive on severance of the tenements (L. P. Inglis, *Walton Bros.*, 1876, 3 R. 1130, p. 1133; Ld. Medwyn, *Carnegie, v.s.* p. 1399; cf. *Borthwick*, 1668, Mor. 9632). The theoretical difficulty, however, is unimportant, as the point may in most cases be solved upon the principle of implied grant. See SERVITUDE. See as to confusion of servitudes, Ersk. ii. 9. 37; Bell, *Prin.* s. 997; Rankine, *Landownership*, p. 388.

Confusion.—The mixing together of fluids belonging to different owners. The right of ownership in the new fluid formed is settled by the same rules as those laid down in regard to COMMIXTION (*q.v.*), the mixing together of solids. The doctrine of confusion of liquids is taken from the Roman law. If fluids belonging to two persons were, by mutual consent, mixed together, the mixture was the common property of both of them, even if the liquids mixed were different. Thus, if wine were mixed with wine, the mixture is common property; if wine belonging to one person were mixed with honey belonging to another, the mead so produced was common property (Just. Bk. ii. 1. 27; *Dig.* xli. 1. 7. 8). If the mixture of fluids were accidental, then there was only common property if the fluids mixed could not be separated. If they could be separated, each party retained the ownership of what had originally belonged to him. If separation was impossible, then each party was entitled to a share of the common property, in proportion to the amount and value of the liquid contributed by him. Thus, if a wine of good quality were mixed with one of poorer quality, the original owner of the better wine would get the larger share of the new wine. If one person mixes together wine belonging to other persons, or partly to himself and partly to another, and forms a new fluid, the component parts of which cannot be separated, he is the owner of the new liquid, but must compensate the persons whose property he has used.—[Bankt. ii. 1. 14; Stair, ii. 1. 41; Ersk. ii. 1. 17; Bell, *Prin.* s. 1298.] See COMMIXTION.

Conjoining of Actions.—*Court of Session.*—When two or more processes dealing with the same subject-matter come to depend before the same Court or judge, whether they have both been brought originally in the same Court, or have come to depend there by remit or transference *ob contingentiam*, and it appears to be expedient that they should be investigated and discussed together, they may be conjoined. This is a matter entirely within the discretion of the Court; so much so, that the House of Lords declined to consider an appeal against an interlocutor refusing conjunction (*North British Railway*, 1862, 4 Macq. 348). "The cases may be so complicated, and there may be such shades of dis-

tinction between the questions which they raise, that confusion and perplexity and embarrassment may be produced by conjoining them, or by trying them together, and of course, if there is the least prospect of that, the Court will never do it. But if that is not so,—if they raise one issue—if the same issue will try both causes,—then it is expedient that that issue should be tried, once for all, in the two processes, and for that purpose the processes should be conjoined" (L. J. C. Inglis in *D. of Buccleuch*, 1860, 4 M. 475). The cases in which the motion for conjunction is usually granted are those in which a supplementary summons has been raised to bring in new defenders, or a second reduction of the same deed has been brought upon different grounds, or cross actions have been raised to try the same question of right. It is not necessary that the parties to the two actions should be the same, if substantially the same question is raised between parties having the same or a similar interest (*D. of Buccleuch, supra*). On the other hand, even although the parties are the same, and the subject-matter of the actions is the same, if different issues of fact are raised, the motion for conjunction may be refused (*National Exchange Co.*, 1861, 23 D. 1278). Even where the other requisites concur, if the two actions are at very different stages of progress, the Court may refuse to conjoin. Where the motion to conjoin actions having a distinct contingency is refused, the Court will generally see that they are put out together at all important stages, in order to save expense and repetition of argument and evidence; or one process may be sisted and the other proceeded with. When actions have been conjoined, they may at any time be disjoined (*Turner*, 1864, 2 M. 509). Conjunction is effected by enrolling the processes for the same day, and the Lord Ordinary or the Court, upon motion, then remits by interlocutor the subsequent process or processes to the one first called, and in that process pronounces an interlocutor of conjunction. The cases then become one process, and any step taken affects both or all of them.

Sheriff Court.—Similar principles apply to the conjunction of processes in the Sheriff Court (Dove Wilson, *Sh. Ct. Pr.* 256). Conjunction there is effected by the judge writing an interlocutor of conjunction in both actions, and thereafter interlocutors are written on the interlocutor-sheet of the principal or leading action, or on a new interlocutor-sheet applicable to the conjoined processes. See CONTINGENCY.

[See Ivory, *Forms of Process*, i. 161, ii. 52; Beveridge, ii. 509 *et seq.*; Shand, *Practice*, 500; Mackay, *Practice*, i. 522, *Manual*, 273; Coldstream, *Procedure*, 99, 152; Balfour, *Court of Session Practice*, 51.]

Conjugal Rights (Scotland) Amendment Act, 1861 (24 & 25 Vict. c. 86).—The preamble of this Act was repealed by the Statute Law Revision Act, 1892. Secs. 1 to 5 enabled a married woman, deserted by her husband, to obtain an order to prevent his seizing, in virtue of his JUS MARITI (*q.v.*), property which she had earned or acquired after the desertion. Power to grant such orders was given to the Sheriff by the Amending Act of 1874 (37 & 38 Vict. c. 31). But the Married Women's Property (Scotland) Act, 1877 (40 & 41 Vict. c. 29) (*q.v.*), excludes the husband's *jus mariti* and right of administration from his wife's earnings; and the Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21) (*q.v.*), excludes the *jus mariti* from a wife's whole moveable estate in marriages after the Act, and in marriages before it from property acquired thereafter, subject to the exception stated in subsec. 1 of sec. 3. Moreover, sec. 5 of the last-named Act empowers the Court,

on petition, to dispense with a deserting husband's consent to any deed relating to his wife's estate (see *Niven*, 1883, 20 S. L. R. 587; *Gibson*, 1893, 1 S. L. T. No. 336; and ADMINISTRATION, HUSBAND'S RIGHT OF). Petitions for protection-orders, accordingly, though still competent, are of rare occurrence (see, for styles of such petitions, Fraser, *H. & W.* ii. 1556). It has not been settled whether there can be any "reasonable cause" for "desertion," in the sense of the Conjugal Rights Act, which would not be a good defence to an ADHERENCE (*q.v.*; *Turnbull*, 1864, 2 M. 402; *Chalmers*, 1868, 6 M. 547). Sec. 6 provides that the husband's rights shall be excluded from property acquired by his wife after a decree of separation, and that if she die intestate such property shall pass to her heirs and representatives as if he were dead. It also gives a wife so separated full contractual capacity (see JUDICIAL SEPARATION; ADMINISTRATION, HUSBAND'S RIGHT OF). Sec. 7 gives power, in a divorce for the wife's adultery, to cite the alleged paramour as CO-DEFENDER (*q.v.*) along with her.

Sec. 8 empowers the Lord Advocate to enter appearance in any action of declarator of nullity of marriage or of divorce (see *Ralston*, 1881, 8 R. 371; *Paul*, Nov. 1896, 4 S. L. T. Nos. 193, 260).

Sec. 9 empowers the Court, in an action for separation or divorce, to make interim orders, or in the final decree to make provision as to the custody of pupil children of the marriage (see *Watson*, 1895, 23 R. 219; and CUSTODY OF CHILDREN).

Sec. 10 provides for personal service in CONSISTORIAL ACTIONS (*q.v.*) on a defender not resident in Scotland, and, where he cannot be found for service, on one or more of his next of kin, and on the children of the marriage. See SERVICE.

Sec. 10 declares it not necessary, prior to an action of divorce, to institute an action of adherence, or to call on the presbytery to admonish the defender to adhere. See ADHERENCE.

Sec. 12 provided that terce shall be claimable from burgage (see TERCE). This section was repealed by the Statute Law Revision Act, 1892. It had been rendered unnecessary by sec. 25 of the Conveyancing Act, 1874 (see BURGAGE). Sec. 13 directs that proofs in consistorial actions shall be taken by the Lord Ordinary; and sec. 15, that actions of aliment in the Court of Session shall not be Inner House causes.

Sec. 16 provides that when a married woman succeeds to or acquires property by any means other than her own industry, the husband shall not be entitled to claim it as falling under the *jus mariti*, except on condition of making therefrom a reasonable provision for her support (*Somner*, 1871, 9 M. 594; *Taylor*, 1871, 10 M. 23; *Ferguson's Tr.*, 1871, 10 M. 54). Such a claim does not seem to have been made since the Married Women's Property Act, 1881. The only case in which it might still be useful would be where the marriage was before that Act, and the husband had made an irrevocable provision for the wife in the event of her survivance (subs. 1 of s. 3). In that case the Act of 1881 would not apply; and the wife might claim, under this section of the Conjugal Rights Act, that provision for her support during the marriage should be made out of her estate. The section is retrospective (*Taylor*, *ut supra*). The wife's claim is excluded if, before it is made, the husband, or his assignee, has obtained "complete and lawful possession" of the property (see *Somner*, *ut supra*).

Conjunct or Confident Person.—This expression is used in the Bankruptcy Statute of 1621, c. 18, to denote the classes of

persons with regard to whom the Statute prohibits gratuitous alienations by an insolvent debtor. The object of the Statute was to strike at secret trusts for the debtor's behoof, operated through the medium of simulate alienations to relatives or confidential friends. The terms "conjunct and confident" are amplified in the preamble of the Statute into "wives, children, kinsmen, allies, and other confident and interposed persons." In the early decisions, the test of relationship in the application of the word "conjunct" was generally taken to be the same as for the declinature of a judge under the Acts 1594, c. 16, and 1681, c. 13. According to this test, parents and children, brothers and sisters, uncles and aunts, nephews and nieces, are conjunct (*Turpersie*, 1673, Mor. 900; *Brown*, 1754, Mor. 886); so are parents and children, and brothers and sisters, by affinity (*Hume*, 1673, M. 899; *Mercer*, 1695, Mor. 12563—a stepson), but not uncle and nephew by affinity (*Elibank*, 1712, Mor. 12569). The husband of a wife's sister, however, was held in one case to be not conjunct (*M'Gowan*, 1826, 4 S. 498). It has not been decided whether a cousin is conjunct (*Sinclair*, 1680, Mor. 12562; *M'Dowal*, 1714, Mor. 12569). The term "confident" does not imply relationship. "The principle of the rule applies to every situation of intimate and confidential intercourse. It seems to comprehend partners in trade, servants, factors, confidential men of business" (Bell, *Com.* ii. 175. As to law agent, see *ib.*). "By confident persons are meant those in whom the granter is presumed to place an uncommon trust from his employing them in certain offices about his person or estate, as a doer, steward, or domestic servant" (Ersk. iv. 1. 31; see *Edmond*, 15 D. 703). Trustees under an ordinary trust settlement are not confident with the beneficiaries (*Young*, 1835, 13 S. 305; see *Watson*, 1874, 1 R. 882). A constituent has been held not confident with his factor (*Buccleuch*, Mor. 12573. It was said, however, that the factor might be confident with regard to his constituent). In one case the debtor's paramour and bastard children were apparently regarded as falling within the category of the Act (*Ballantyne & Dunlop*, 17 Feb. 1814, F. C.). See INSOLVENCY.

Conjunct Rights.—A right to property may be conveyed to two or more persons jointly, and the destination, which may be expressed in a variety of terms, will be subjected to varying interpretation, according as the grantees are husband and wife, parent and child, or standing in neither of these relations to each other.

1. *Husband and Wife.*—Where a right is conveyed to spouses conjunctly, the general rule is that it suffers no division; and in the absence of other indication, the right is held to be in the husband only as the *dignior persona*, or, as the older jurists say, *propter eminentium masculini sexus*. So a destination to husband and wife in conjunct fee, or in conjunct fee and liferent, vests the sole fee in the husband, the wife having merely an eventual right of liferent if she survive him (*Laws*, 1697, M. 4236) The substitution of "their heirs" gives a *spes successionis* to the husband's heirs only. And the substitution of children of the marriage *nominatim* to the fee gives them no more than a *spes successionis* (*Wilson*, 14 Dec. 1819, F. C.; *Steele*, 1823, 2 S. 146; *Fisher's Trs.*, 1844, 7 D. 129; *Forrest*, 1863, 1 M. 806). Where the conjunct fee is given to the spouses and the longest liver or survivor of them and "their heirs," or "the heirs of the survivor," the wife, on survivance, will take the whole fee, and her heirs will succeed to the exclusion of the husband's heirs (*Ferguson*, 1739, M. 4202; *Boyd*, 1749, M. 4205; *M'Gregor*, 1831, 9 S. 675; *Burrowes*, 1842, 4 D. 1484). But if the substitution is not

to "their heirs," but to "the heirs of the marriage," these are the husband's heirs, and the wife's right, on survivance, does not extend beyond a liferent (*Neilson*, 1732, 1 Pat. App. 65; *Mackellar*, 1840, 3 D. 172; *Madden*, 1842, 4 D. 749).

If the conveyance shows a preference for the wife and her heirs, the fee will be in her, not in the husband (*Murray*, 1739, 1 Pat. App. 251; *Sinclair*, 1771, M. 4241; *Cameron*, 1837, 15 S. 1205; *Smith Cunninghame*, 1869, 7 M. 689). The wife is also fiar where the property has come from her or her relations (*Murray, supra*; *Wordie*, 1750, M. 4207; *Sinclair, supra*; *Paterson*, 1780, M. 4212; *Muirhead*, 1824, 2 S. 617; *Myles*, 1857, 19 D. 408; *Smith Cunninghame, supra*; *Brough*, 1887, 14 R. 858), unless it has been given as tocher, in which case it is the evident intention that the husband should acquire it (*Graham*, 1639, M. 4226; *Gairns*, 1671, M. 4230; *Ramsay*, 1682, M. 4234; *Northsenton's Crs.*, 1720, M. 4244; *Bruce-Henderson*, 1790, M. 4215). In considering whether any property is tocher, it is important to observe whether any other is given *nomine dotis* (*Paterson*, 1780, M. 4212), whether it is a specific sum or property, or the whole estate of the wife present and prospective, and whether it is given by her father or other relative, or conveyed by the wife herself (*Smith Cunninghame, supra*). The rule *traditionibus et usucapionibus dominia transferuntur non nudis finibus* raises a strong presumption against divestiture of the fee on the part of the wife (*Grays*, 1773, M. 4210; *Dewar*, 1825, 1 W. S. 161). But this may be displaced by an indicated preference for the husband and his heirs (*Erneslaw's Crs.*, 1705, M. 4223). That spouse's heirs are preferred which are called immediately after the heirs of the marriage: the calling of the heirs of the marriage is not such a substitution of the husband's heirs as to indicate a preference for him (*Ramsay*, 1612, M. 4226; *Myles, supra*). *In dubio* the fee is in the spouse to whom power is given to dispose of the property, but an absolute power of disposal is to be distinguished from a faculty or power of administration, such as a power of apportionment (*E. Dunfermline*, 1676, M. 4244). The words "heirs and assignees" have been held to import a fee, since none but a fiar can assign (*Fead*, 1709, M. 4240). On the other hand, an unlimited power to borrow on the property is not equivalent to a power of disposal (*Bousfead*, 1879, 7 R. 139). A conveyance in conjunct liferent may be construed as a fee where an absolute power of disposal is reserved; and a destination in conjunct fee and liferent will be read as giving only a liferent, if such an intention be apparent in the deed (*Pringle's Crs.*, 1714, M. 4261; *Watherstone*, 1801, M. 4297; *Rollo*, 1832, 11 S. 132; *M'Gowan*, 1862, 2 M. 943; *Bryson*, 1893, 20 R. 986). The words "for his (or her) liferent use allenarly (or only)" will display an intention so to limit the grant, but such an expression as "during all the days of his lifetime" are not taxative (*Wilson, supra*). An exclusion of the husband's creditors will indicate an intention to give him only a liferent, although the destination is sufficient to confer a fee (*Young*, 1835, 14 S. 85). Where property coming from a wife was destined to herself and husband in conjunct fee and liferent, for their liferent use allenarly, and to the children of the marriage in fee, the wife was held, failing children of the marriage, to be undivested fiar (*Reid*, 1827, 6 S. 198). Under a destination to husband and wife in conjunct fee and liferent, and to the longest liver, and to the heirs of the marriage, whom failing, one half to the heirs of the husband and the other half to the heirs of the wife, a surviving wife was found entitled, failing children of the marriage, to the liferent of the whole and the fee of one half (*Purdie*, 1707, M. 4238; *Mad-*

den, supra). A conjunct liferent to spouses will not import a fee in either, unless that is required by the subsequent terms of the destination to prevent the fee being *in pendente* (*Thomsons*, 1681, M. 4258; *Sinclair*, 1824, 2 D. 643; *MacGregor, supra*; *Mackellar, supra*). Where spouses enjoy a joint liferent, the right of the wife will be in abeyance during her husband's life, but is indefeasible at his instance (*Thom*, 1852, 14 D. 861).

Where the subject of the conveyance does not consist of *feuda* or *quasi-feuda*, a more literal interpretation has been given to the destination, on the ground that there was no reason for maintaining the right in an undivided condition (*Bartilmo*, 1632, M. 4222; *A. v. B.*, 1678, 3 B. S. 242).

2. *Parent and Child.*—A destination to a parent in liferent and his children *nascituri* or unnamed in fee, is construed as giving a full right of fee to the parent. The children have only a *spes successionis* (*Frog's Trs.*, 1735, M. 4262; *Lindsay*, 1807, M. *voce* Fiar, App. 1; *Williamson*, 1828, 6 S. 1035). This rule is founded on a combination of two principles, neither of which alone sufficiently accounts for it. These are the presumed intention of the granter of the deed, and the feudal maxim that a fee cannot be *in pendente*. The rule holds whether the fee is destined to the whole children procreated or to be procreated, or to one of them, *e.g.* to the heir-male (*Dewar*, 1825, 1 W. S. 161); and whether or not all or any of them be alive at the time when the grant takes effect (*Porterfield*, 1779, M. 4277; *M'Donald*, 1831, 9 S. 269; *Ferguson's Trs.*, 1860, 22 D. 1442; affd. 24 D. H. L. 8). It is equally applicable to a conveyance of heritage and of moveables. A disposition to a parent and children in equal proportions, with a substitution failing them, also gives the sole fee to the parent (*Edward*, 1840, 10 D. 685).

The parent's right may be restricted to a liferent by the use of some such taxative expression as "for liferent allenarly (or only)," or by some clear indication that the intention is to convey no more (*Nevlands*, 1794, M. 4289; *Harvey*, 26 May 1815, F. C.; *Miller*, 1833, 12 S. 31). The words "for liferent alimentary," coupled with a power of division of the fee among children, have been held sufficient to exclude a fee in the parent (*Curran*, 1781, M. 4402); but a mere declaration that a bequest is alimentary does not seem to have that effect (*Hutton's Trs.*, 1847, 9 D. 639; *Gibson's Trs.*, 1877, 4 R. 1038). A limitation to a liferent may be imposed by excluding the parent's creditors (*Douglas*, 1811, Hume, 173), or by directing the interest to be paid to the parent in liferent, and the property or principal sum to the children (*Bushby*, 1825, 4 S. 110; *Scott*, 1826, 4 S. 454; affd. 2 W. S. 550; *Dawson*, 1877, 4 R. 597). But the limiting words must clearly restrict the right of the parent, and not amount merely to the expression of a wish on the part of the granter of the deed (*Alexander*, 1849, 12 D. 345 and 348; *Houston*, 1877, 5 R. 154). If the restriction be definite and certain, the parent is entitled to a liferent only; but he is also vested with a fiduciary fee for the children, which, however, will give him no more power over the subject than a liferent. A beneficial interest as disponee, not as heir, vests in each child at birth, and transmits to his representatives (*Dundas*, 1823, 2 S. 145; *Douglas*, 1870, 8 M. 374).

Where the children are called *nominatim* to the fee, or where the fee is destined to one or more *nominatim*, and others to be born, the right of the parent is to a bare liferent (*M'Intosh*, 28 Jan. 1812, F. C.). In the latter case, the fee is vested in the children named, for themselves and as trustees for those to be born (*Dykes*, 3 June 1813, F. C.). In a conveyance to a person in liferent for liferent use allenarly, and one half to her children in fee, the fee of the other half to a stranger, who, failing

issue of the liferentrix, was to have the fee of the whole, it was held that the whole fee vested in the stranger, subject to defeasance to the extent of one half on issue being born to the liferentrix (*Martin's Trs.*, 1864, 3 M. 326; *Cumming's Trs.*, 1895, 23 R. 94). But where the ultimate fiars cannot be ascertained till the death of the liferenter, or the dissolution of the marriage, the fiduciary fee is in the parent, not in the children named (*M'Gowan*, 1864, 2 M. 943; *Snell*, 1872, 10 M. 745), the latter having a *jus quæsitum* to prevent their contingent rights being prejudiced (*M'Gowan*, 1862, 1 M. 141).

A conveyance by one spouse to the other in liferent and the children in fee, has been held to leave the granter undivested fiar (*Veitch*, 1630, M. 4256; *Fraser*, 1707, M. 4259; *Turnbulls*, 1822, 2 S. 1; *Findlay*, 1849, 12 D. 325). If, in a destination to the children in fee, a liferent only has been reserved to the parent, coupled with a power of absolute disposal, this power has the effect of converting the reserved liferent into a fee (*Dickson*, 1780, M. 4269; *Wilson*, 14 Dec. 1819, F. C.; *Turnbulls, supra*).

The most common method of limiting the right of the parent to a liferent is by the intervention of a trust; but the constitution of a trust has no such effect if it exist merely for the purpose of conveying or transferring the property of the truster to the beneficiaries. Directions to pay, or to dispone and convey, indicate that this is its nature (*Robertson*, 1806, M. *voce* Fiar Abs., App. 2; *Hutton's Trs., supra*; *Ferguson's Trs., supra*; *Massy*, 1872, 11 M. 173; *Gibson's Trs., supra*; *Beveridges*, 1878, 5 R. 1116). A continuing trust must be established, in which a duty is imposed of retaining and managing the estate for behoof of those interested, and for the protection of their rights (*Bushby, supra*; *Mein*, 1827, 5 S. 779; affd. 4 W. S. 22; *Ewan*, 1828, 6 S. 1125; *Ross*, 1847, 9 D. 1327; *Hutchison*, 1853, 15 D. 570).

It does not follow, from the rule by which a disposition *ex figura verborum* of a liferent is construed as a conveyance of a fee, that the parent is vested with an absolute right over the subject. Where the grant is by marriage contract or testamentary settlement, the fee may be so qualified as to protect the interests of the children, and prevent its disposal to their prejudice (*Gordon*, 1841, 4 D. 192; aff. 4 B. App. 105; *Massy, supra*; *Gibson's Trs., supra*; *Bradford*, 1884, 11 R. 1135). It often happens that a testator makes a provision of the liferent of property to a child, to be accepted in lieu of legitim, the fee being destined to such child's issue. If legitim be claimed, the liferent only is forfeited, not the fee (*Ewan, supra*; *Fisher*, 1833, 10 S. 55; affd. 6 W. S. 431; *Collier*, 1833, 11 S. 912; *Jack*, 1879, 6 R. 543), unless there be a forfeiture clause sufficiently wide in its terms to include the fee also (*Wilson*, 1840, 2 D. 1236; *Campbell's Trs.*, 1889, 16 R. 1007). If the bequest be to the grandchildren solely, no provision being left to their parent, the rights of the grantees will not come within the scope of a general forfeiture clause (*Kintore*, 1884, 11 R. 1013; affd. 13 R. (H. L.) 93; *Urie's Trs.*, 1896, 23 R. 865). See LEGITIM.

3. *Strangers.*—A conveyance to two or more persons in conjunct fee, or jointly, and their heirs and assignees, gives to each a *pro indiviso* share, descending at death to his own heirs. The additional mention of a liferent, *e.g.* to A. and B. in conjunct fee and liferent, gives to the survivor a liferent of the share of the predeceaser, indefeasible by the latter. If the destination be to two persons and the survivor (or longest liver) and his (or their) heirs, the fee of the whole will, on the death of one, pass to the survivor (*Bisset*, 1799, M. *voce* Deathbed, App. 2). But the share of the predeceaser will be attachable by his creditors, and may be burdened or disponed by his deed

either *inter vivos* or *mortis causa*. If only the liferent be given jointly, and the fee be destined to one and his heirs, that one is sole fiar: but a survivor will have a right of liferent in the share of the predeceaser if the liferent be given to two persons and the longest liver or survivor. An eventual right to the whole may be given to one conditionally on survivance, *e.g.* to A. and B. in conjunct fee (and liferent), and to B. if he survive. If B. do not survive, A. and B.'s heirs divide the property, A. having a liferent of B.'s share if the words "and liferent" be introduced. During their joint lives each may dispose of his *pro indiviso* half as he pleases.

Liferent and fee may be distinguished in the destination, *e.g.* to A. and B. and survivor in liferent, or to A. and B. in conjunct liferent, and to C. and D. in fee. The survivor of A. and B. will have a liferent of the whole, the fee eventually dividing between the heirs of C. and D. If in this case the liferent had merely been given equally to A. and B., no right in the share of one would, on his death, pass to the other.

All the above general rules are subject to modification, according to the exigencies of the particular case, the dominant principle being to ascertain the intention of the granter of the deed.

[Stair, ii. 6. 10, ii. 3. 41; More, *Notes*, 175; Ersk. iii. 8. 35–6; Bell, *Com.* i. 54–5; Bell, *Prin.* 1709, 1953; Bell, *Convey.* ii. 834; Fraser, *H. & W.* 1427; Craigie, *Heritable Rights*, 2nd ed., 172, *Moveable Rights*, 2nd ed., 435; M'Laren on *Wills*, 606, 628.] See Fee and Liferent.

Conjunctly and Severally.—The position of co-obligants in a debt varies according as they are liable conjunctly, *i.e. pro rata*, or conjunctly and severally, *i.e. in solidum*. A co-obligant bound conjunctly with others may claim the *beneficium divisionis* if an action is brought against him for more than his proportional share of the debt: if he pays his share, he discharges all the obligation under which he lies (*M'Arthur*, 1836, 15 S. 270). In a conjunct and several obligation, any one of the co-obligants may be compelled to pay the whole debt, and until the full obligation is extinguished his liability is not discharged (*Richmond*, 1847, 9 D. 633). In conjunct obligations, extinction takes place upon payment or satisfaction, or its equivalent by all: in those conjunct and several, satisfaction or its equivalent by one operates a discharge to all. Confusion does not extinguish the debt; but acceptilation does, since it discharges the object of the obligation. The discharge must destroy the ground of debt, and not be a mere personal protection to one debtor, unless it be granted to a principal for whom his co-debtors are cautioners (Stair, i. 18. 5). By the Mercantile Law Amendment Act (Scotland) 1856, s. 9, the release of a cautioner without the consent of his co-cautioners effects their release also. "In the case of joint and several debtors, discharge of one will operate the discharge of the others to the extent to which they have, by the act of the creditor, been deprived of their relief" (per Ld. Cowan in *Western Bank*, 1862, 24 D. 859).

A conjunct and several obligation is usually constituted by writing or decree. Where it is not so constituted, any action to enforce payment or performance must be raised against all the co-obligants subject to the jurisdiction of the Courts of Scotland. But this is a rule of equity, and may be relaxed where its enforcement would be likely to cause injustice (*Zuill*, 1842, 4 D. 871; *Neilson*, 1890, 17 R. 608; Mackay, *Practice*, i. 353). It does not hold in the case of co-delinquents (*Western Bank*, 1860, 22 D. 447; *Croskery*, 1890, 17 R. 697). In the case of a partnership debt, it is

necessary to constitute the debt against the company before any one of the several partners can be forced to pay. But where a foreign company had no separate *persona*, and had been dissolved some years previous to the raising of the action, it was found competent to sue the only partner subject to the jurisdiction of the Scots Courts (*Muir*, 1862, 24 D. 1119; *Reid & M'Call*, 11 June 1814, F. C.; *Geddes*, 1827, 5 S. 697; *Dewar*, 1831, 9 S. 487; *Johnstone*, 1824, 2 S. 532; *M'Naught*, 1885, 13 R. 366). Where it is a condition precedent to the obligation coming into existence that all shall sign the bond, none will be bound until that is done (*Paterson*, 1844, 6 D. 987; *Scottish Provincial Assur. Co.*, 1858, 20 D. 465); but where there is no such condition, the liability of those who have signed will not be obviated by the fact that others mentioned as co-obligants in the deed have not signed (*Gordon*, 1761, M. 14677; *Craig*, 1865, 4 M. 192).

The oath of one *correus* upon reference will probably suffice to extinguish the creditor's claim, but cannot set up that claim against any of the other *correi* (Stair, iv. 44. 8; Ersk. iv. 2. 10; Bell, *Prin.* 2266; Dickson on *Evidence*, 1470; *Duncan*, 1831, 9 S. 540).

Where one debtor has paid more than his share, he is entitled to relief from his co-obligants without any agreement to that effect, and without an assignation from the creditor. The effect of this is, that the debt is divided among the co-debtors, each of whom is liable to refund his share to the one who has paid. Where the paying debtor has obtained an assignation from the creditor, he has been held entitled to enforce payment of the full amount from one of his co-obligants, deducting his own share (*Kincaid*, 1665, M. 14640; *Smeiton*, 1684, M. 14641); otherwise he can only demand a share from each (*Craigie*, 1710, M. 14649). It has been questioned whether a paying debtor can charge a co-debtor on getting an assignation to a bond, or must raise an action for relief: but there seems little doubt of the regularity of a charge (*Erskine*, 1842, 4 D. 1478; *Finlayson*, 1827, 6 S. 264; *Carswell*, 1850, 12 D. 462). If one of the debtors is insolvent, his share, so far as not furthcoming from his estate, must be borne proportionally by the others (*Cleghorn*, 1707, M. 14624; *Muire*, 1682, M. 14654). In claiming relief, a co-obligant must give his co-debtors the benefit of any ease he may have obtained (*Milligan*, 20 May 1802, F. C.; *Ledingham*, 1824, 3 S. 74; *Finlayson, supra*).

There is no relief where the debtors were only under a moral obligation to pay (*Henderson*, 1867, 5 M. 628); nor between co-delinquents (*Western Bank*, 1862, 24 D. 859); but where a joint and several decree has been obtained against the latter, one who pays the whole will have relief, since the original obligation has been extinguished by novation (*Wick and Pulteneytown Steam Shipping Co. Ltd.*, 1894, 21 R. (H. L.) 39). A principal has of course no relief against his cautioner, who has been bound as principal debtor with him, but must relieve him of the full amount of the debt (Stair, i. 8. 2 and 9, i. 17. 20; More, *Notes*, 118; Bankt. i. 23. 83, iv. 36. 15; Ersk. iii. 3. 70 and 74; Bell, *Com.* i. 361; Bell, *Prin.* ss. 51–62; Ross, *Lect.* i. 76; Menzies, *Lect.* 211; M. Bell, *Convey.* i. 259; Potier on *Obligations*, ss. 261–282).

See Cautionary Obligations; Co-obligant.

Connivance.—See Lenocinium.

Conquest.—Conquest has two meanings: (1) in the law of heritable succession, and (2) in marriage contract provisions.

I. *In Heritable Succession.*—In intestate successions which opened before 1st October 1874, heritable property was in certain cases divided between the heirs of line and the heirs of conquest. In this connection heritage was opposed to conquest. The heir of line took all heritage to which the defunct had succeeded as heir, while the heir of conquest took all heritage or heritable rights requiring infeftment for their completion, which the defunct had acquired by purchase, gift, or other singular title from one to whom he would not have succeeded by law. The only occasions on which this distinction arises are where the nearest of kin of the defunct are older and younger brothers, or their issue; or uncles older and younger than the father of the defunct, or the issue of such uncles.

It does not appear to arise where the next of kin are similar collaterals of the grandfather or other ancestor.

Where, therefore, a middle brother or sister, or their issue, died, conquest, which ascends by degrees, went to the next elder brother or uncle and their issue. And heritage, which descends by degrees, went to the next younger brother or uncle and their issue. With this exception, the rules of succession to conquest are the same as those of heritage. See SUCCESSION (HERITABLE).

Conquest in the person of a brother succeeded by an older and a younger sister, was divided between them as heirs-portioners (*Carse*, Mor. 14873). If the defunct be the youngest brother, the immediate elder brother took both heritage and conquest (*Grant*, Mor. 14874; *Robertson*, Mor. 5605).

Conquest included lands and heritable rights passing by infeftment (*D. Hamilton*, Mor. 5554); annual rents (*Robertson*, Mor. 5605); heritable bonds (*A. & B.*, Mor. 5608; *Hamilton*, Mor. 5615; affd. 1 Paton, 271); dispositions of land on which sasine had not been taken (*Menzies*, Mor. 5614; *Hamilton, ut supra*); appraisings (*Anderson*, Mor. 5609); adjudications, rights to heritage standing in third parties' persons in trust, even when there was no document of trust (*Hamilton, ut supra*); and heritable rights under trust dispositions (9 S. 295, and 7 W. & S. 1; *Campbell*, 17 D. 759). It is thought that leasehold property would also fall into conquest, provided the titles have been recorded in the Register of Sasines under the Registration of Leases Act, 1857.

The question whether teinds can be included in conquest has not been decided. Lord Elchies and Lord M'Laren seem to be of opinion that they might be so included. There have been cases (*Greenock*, 1736, Mor. 5612; *Duke of Hamilton*, 1740, Mor. 5615) where the teinds went to the heir of line. The reason seems to have been because the teinds in question followed the lands, which lands in these cases went to the heir of line.

Conquest does not include rights not requiring infeftment, such as leases (unrecorded) (*E. Dunbar*, Mor. 5605; *Ferguson*, Mor. 5605); pensions (Ersk. iii. 8. 16; M'Laren on *Wills*, s. 148); and personal bonds excluding executors (*Begbie*, Mor. 5609; *Hamilton*, Mor. 5615, 1 Paton, 271). A share of collated heritage is not conquest (*Napier*, 6 M. 264); nor is estate to which the defunct succeeded as heir of provision (*Boyd*, Mor. 3070).

Estate to which the defunct succeeded as heir of conquest, and has completed his title, goes to his heir of line. Conquest can ascend but once (*Aitchison*, 7 S. 558).

Udal property, if held on unrecorded titles, will no doubt be excluded from conquest, but the point is undecided.

Entailed estate in the person of the institute, provided he would not have succeeded by law to the granter, is conquest.

The rules where heirs are called to the succession under destinations are—

1. Where the succession opens to the heir of the granter of the destination *as conditional institute*, his heir of conquest takes if the property was conquest in the person of the granter (*Boyd*, 1774, Mor. 3070).

2. Where the succession opens to the heir of the granter of the destination *as substitute*, the heir of line succeeds whether the property was conquest of the granter or not (*Robinson*, 21 D. 905; *Mackintosh*, 11 M. 636).

3. Where the succession opens to the heir of the institute, in whose person it was conquest, the heir of conquest succeeds (*Brown*, 17 D. 759).

4. Where the succession opens to the heir of a disponee *as conditional institute*, the heir of line succeeds (*Miller*, 9 S. 295: affd. 1831, 7 W. & S. 1).

5. Where the succession opens to the heir of a disponee *as substitute*, the heir of line succeeds, as the property is not conquest in the person of an heir of provision.

[M'Laren, *Wills and Successions*, 81: Ersk. *Inst.* iii. 8. 14 and 15; Bell, *Prin.* 1670–76.]

In all successions opening after October 1, 1874, the fees of conquest descend to the same persons, in the same manner, and subject to the same rules, as fees of heritage (*Conveyancing Act*, 1874, s. 37).

II. *Conquest in Marriage Contract Provisions.*—A provision of conquest in a marriage contract was an ancient mode by which the husband settled on his wife and family what property, heritable or moveable, he then had, and a whole or a part of what might be conquest, or acquired during the marriage. Such a clause was introduced to give them a share in his prosperity, and to encourage thrift in them. The clause has been productive of much litigation, and it is ill suited to the exigencies of the present day. Nevertheless it is retained in the Style Book.

Conquest has been defined by Lord Inglis in *Diggens* (3 M. 609; affd. House of Lords, 5 M. 75), as every profitable addition to the goods in communion, or to the heritable estate of the husband, which does not come by succession. Such additions must be made during the subsistence of the marriage; and the value is ascertained as at its dissolution, when the husband's debts (*Anderson*, Mor. 12960: *Craikshank*, Mor. 12964), and the amount of his and his wife's estates as at the date of the marriage, are deducted. To facilitate this calculation, the contract ought to contain a statement of the amount of the said estates as at the date of the marriage.

No claim can lie against the husband during his life. He remains fiar, limited only in that he cannot grant gratuitous deeds *in fraudem* of the provision (*Champion*, 6 M. 17; *Arthur & Seymour*, 8 M. 928). The children are not creditors of the father till his death, and are then postponed to his onerous creditors (*Arthur, etc., ut supra*). The father has been compelled to take the destination of land bought in terms of the marriage contract provision (*Paxton*, Mor. 12860; *Cairns*, Mor. 12862).

Conquest includes what the husband acquires *jure mariti*, unless the wife has succeeded as legatee, heir, or executor (*Rae*, 23 Jan. 1810, F. C.; *Diggens, ut supra*).

It is doubtful whether conquest includes what is acquired by donation; but the best opinion seems to be that of Lord Fraser, following *Mercer* (Mor. 3054), and the reasons stated by Lord Kames (*Elucidations*, 6, p. 41), that donations are not included.

Leases fall under provisions of conquest of "heritages" (*Duncan*, 15 Feb.

1810, F. C.), but not under "goods and gear" (*Paterson*, 1800, Hume, 128), nor under "lands and annual rents" (*Dunfermline*, Mor. 3048).

The rules of conquest are not applicable to the provisions made by the wife in marriage contracts by conveyance to trustees. Life interests and annuities, to which she has become entitled during the subsistence of the marriage, do not fall under her conveyance to trustees of what she might conquest and acquire (*Boyd*, 4 R. 1082; *Young's Trs. & Others*, 12 R. 968).

Provisions to a second wife and family out of conquest are competent, provided they are reasonable, and the husband has no other funds out of which to make such provisions other than the funds settled by the first marriage contract (*Arthur & Seymour, ut supra*).

Provisions of conquest to the children of the first marriage are deducted before the conquest provided by a second marriage contract can be calculated (*Fraser*, Mor. 12896).

Debts are always deducted before provisions of conquest can be ascertained. It is a question of construction whether heritable debts can be paid out of moveable estate, and *vice versâ*. The cases are: *Dolly*, 3 Sup. 165; *Beattie*, Mor. 3067; *Stenhouse*, Mor. 11444 and 11475; *Fraser, ut supra*; *Hunter's Trs.*, 1 D. 824.

The father has an inherent power of allocation of conquest among the children, and may even make an unequal division, provided he does not totally exclude one without cause from a share (*Dowie*, Mor. 13004; *Campbell*, Mor. 13004).

The discharge by one of the children of the marriage of his share of conquest does not increase the share of the remaining children (*Sinclair*, 2 Paton, 199).

Consanguinean.—The term consanguinity is sometimes used to express blood relationship generally; it should more properly be confined to the definition of one of the half-blood relationships. Half-blood relationships are either consanguinean or uterine. Persons born or descended of the same father, but not of the same mother, are consanguinean relations: those born or descended of the same mother, but not of the same father, uterine relations. Persons related of the full blood are termed relations german (Bell, *Prin.* 1651–54).

In the matter of degrees of kinship within which marriage is forbidden, the rules of the law of Scotland are the same whether the parties be related of the full or of the half blood (Ersk. i. 6. 9; Hume, i. 448).

See Half Blood; Uterine; Succession; Collateral Succession; Degrees of Kinship.

Consensus non concubitus facit matrimonium.—See Marriage.

Consent.—The consent of parties is essential to a legal contract. It may be defined as the voluntary, deliberate, and expressed purpose to engage in the contract or obligation.

Pupils and Imbeciles are legally incapable of giving consent, and cannot therefore enter into any binding contract. This disability was also extended to deaf and dumb persons by the Roman law: but by the law of Scotland such persons may contract, if they have the use of reason and

appear to understand the nature of the engagement into which they are entering (Ersk. iii. 1. 16). See PUPIL; IDOCY; INSANITY. Absolute *drunkenness*, depriving one of "the exercise of reason," is a bar to his entering into a valid obligation: but a lesser degree, which "darkens reason," does not annul the contract (Ersk. *supra*: see *Johnston*, 1854, 17 D. 228; *Couston*, 1862, 24 D. 607; *Mackay*, 1831, 5 W. & S. 210; Chitty on *Contracts*, 13th ed., 172).

Minority is a state not of "total incapacity, like pupilarity, but of limited capacity: in which the minor is held capable of consent, but of inferior judgment and discretion, requiring the protection of the law" (Bell, *Prin.* 2088). A minor without curators has redress within the *quadriennium utile* against any deed, attended with lesion, to which he has been a party (Ersk. *Prin.* i. 7. 34; Bell, *Prin., supra*). If he have curators, all deeds *inter vivos* affecting his property are (with a few exceptions) null without their assent. Even the consent of curators is not conclusive to bar a challenge on the ground of minority and lesion, provided it is made within the *quadriennium utile* (Bell, *Prin.* 2098: *Manual*, 1853, 15 D. 284): and no minor, even with curatorial consent, can by gratuitous deed alter the succession to his heritage (Ersk. i. 7. 18. 33; Fraser, *P. & C.* 388). See MINOR.

A *wife* has also only a limited capacity to contract. She may, with her husband's consent, dispose of her own estate: but the law regards deeds of alienation by the wife of her own property with a jealous eye, presuming them to proceed from the husband's undue influence, until such presumption is counteracted by judicial ratification (Ersk. *Prin.* i. 6. 19; Bell, *Prin.* 1615). See RATIFICATION.

If a woman has been married since the passing of the Married Women's Property Act, 18th July 1881 (44 & 45 Vict. c. 21), provided her powers have not been modified by antenuptial deed, the income of her separate estate is payable to her on her individual receipt, free from her husband's right of administration, and she may deal with it as she pleases. But she cannot assign prospective income without her husband's consent. Nor can she, without such consent, deal with her *legitim* (s. 1 (2); see sec. 5 for cases where husband's consent may be dispensed with by the Court on petition: *Miller*, 1886, 13 R. 764).

In all contracts, *error* in the essentials excludes real consent. In such a case there is only an apparent, not a real contract. The party who errs, or is misled, does not comprehend his bargain, and so is incapacitated from entering into it. The contract is therefore null and void, as distinguished from a contract induced by *fraud*, which is only voidable (Ersk. *Prin.* iii. 1. 6: Bell, *Prin.* 13). This error in essentials may relate to the person with whom the contract is made; to the specific subject of the contract; to the quantity or quality of the subject; or to the nature of the engagement (*Woods*, 1893, 20 R. 477; *Maclaurin*, 1876, 3 R. 265). It would seem that the error must be common to both parties, or, if confined to one, must have been induced by the representations of the other (*Stewart*, 1890, 17 R. (H. L.) 25).

The error must be one of fact, for *ignorantia juris neminem excusat*. But the rule has been interpreted as applying only to ignorance of the general law of the land, and not to ignorance of private rights,—the effect being that mistakes as to the application of the general law to particular circumstances are regarded as errors of fact. In the case of *Cooper* v. *Phibbs* (L. R. 2 H. L. 149) Lord Westbury says (p. 170): "It is said '*ignorantia juris haud excusat*,' but in that maxim the word *jus* is used in

the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake." (Cf. *Inglis' Trs.*, 1887, 14 R. 740, opinion of Lord Shand.) See ERROR.

Again, if consent is only given under stress of *force and fear*, the engagement is null and void, because the will of the person does not truly enter into the contract (Ersk. *Prin.* iii. 1. 6; Bell, *Prin.*, Note relative to ss. 11, 12, and 13). "The objection on the ground of error or force will be effectual against third parties without notice; under the exception of land or heritable securities acquired on the faith of the records, moveables corporeal, and bills and notes" (Bell. *Prin.*, Note, *supra*).

In the case of contracts induced by *fraud*, there is apparent consent, but not such as the party in fault is entitled to rely upon. Such a contract is voidable at the option of the injured party, under certain conditions. But the fact of an innocent third party having, during the subsistence of the contract, acquired for value an interest in regard to it, will prevent its rescission (Bell, *Prin.* 13 *et seq*). See FRAUD; CIRCUMVENTION (FACILITY AND): UNDUE INFLUENCE: RESTITUTIO IN INTEGRUM.

Consent must be *consensus in idem placitum* (*Buchanan*, 1878, 5 R. (H. L.) 69), *i.e.* there is no consent where it appears that the parties have been *bonâ fide* at cross purposes, one believing that he was agreeing to one thing, the other believing that he was agreeing to another (*Stewart*, 17 R. (H. L.) 25). Similarly, where an acceptance does not square with an offer at any moment, but is in reality a counter offer, there is no bargain. But where there is apparent discrepancy between the offer and the acceptance, such discrepancy may be proved to exist only in form, and the acceptance may be shown to be real (*Erskine*, 1871, 9 M. 956).

In the case of a contract entered into through the medium of the post office, some latitude must be given. The offerer is then considered to adopt the post office as his agent. He therefore takes the risk of delay or loss in transmission, and these eventualities do not affect the person to whom the offer is made. The latter, having once received an offer, is thereby given the power of acceptance, a right which he can only lose by *mora*, or by the receipt from the offerer of a recal of his offer (*Truman*, 1894, 3 Ch. 372: *Henthorn*, 1892, 2 Ch. 27: *Jacobsen*, 1894, 21 R. 654). Acceptance, on the other hand, is constituted by the mere posting of a letter of acceptance (*Dunlop*, 1848: 6 Bell's App. 195: *Household Fire Insur. Co.*, L. R. 4 Ex. Div. 216: cf. *Mason*, 1882, 9 R. 883, per Ld. Shand.

[Bell, *Prin.* 10 *et seq*: Ersk. iii. 1. 16; Ersk. *Prin.* iii. 1. 6 and 7.] See CONTRACT.

Consenter.—If the true owner of heritable property be taken as consenter to a disposition or other conveyance of the lands, such consent renders the deed as valid as if granted by the consenter himself; and this whether the title of the principal disponer be merely defective, or whether no title at all be vested in his person (*Buchan*, 1739, Mor. 6528, Kilk. *voce* 'Implied Disch.' No. 2: *Mounsey*, 1808, Hume, 237: *Stirling*, 1630, Mor. 6521. See also *Moncrief*, 1691, 2 Bro. Supp. 129: *Lockhart*, 1637, Mor.

7801; *Sorley's Trs.*, 1832, 10 S. 319). This effect is of course excluded in cases where the true owner's consent is expressly qualified in extent, *e.g.* a consent to the disposition merely in so far as the disponer's rights in the lands may go.

On the other hand, consent by the creditor in a heritable security to a disposition of the lands over which the security is constituted, is construed otherwise, and is taken as merely implying that the creditor will not use his security to the prejudice of the disponee (*Buchan, supra*; *Boyd*, 1665, Mor. 6522). The creditor's personal claim against the debtor, or his recourse upon any other lands upon which the debt may be secured, is not thereby surrendered. To have this effect, a conveyance of the debt itself must be taken.

There being no implied warrandice against a consenter further than as to rights then in his person, a consenter is not barred, in a question with the disponee, from founding upon and ousting the disponee in virtue of rights acquired by him subsequently to the date of his consent (*Forbes*, 1668, Mor. 7759, 6524; *Stuart*, 1681, Mor. 7762; see also *E. of Errol*, 1667, Mor. 6523). The doctrine of accretion, which is based upon the absolute warrandice of a disponer, does not apply to a consenter. See ACCRETION. See generally, Stair ii. 11. 7, iii. 2. 9; Ersk. ii. 3. 21. 25, ii. 7. 4; Menzies, *Convey.* 534; Bell, *Convey.* i. 581: More's Stair, cclxiv.

The general principle applicable to the construction of consents to deeds seems to be, that such consent will not inferentially be extended further than the limits expressed by the deed, if any limit be so expressed, or beyond what is necessarily implied from the consent given (see *Edward*, 1888, 15 R. (H. L.) 33). This appears to be the principle underlying the older cases of *Guild*, 1623, Mor. 6521, and *Murray*, 1674, Mor. 6525, in which consent by a wife to her husband's testament was read as having reference merely to her interest in the dead's part, not as barring her from subsequently claiming her legal rights.

The consent, to be effectual to operate either as a virtual conveyance or as a mere *non repugnantia*, must be a written consent subscribed by the consenter (*Lauderdales*, 1752, Mor. 14465, at p. 14477). Beyond this no restriction in form appears to be attached. Thus the consent of a wife to her husband's deed will be effectual though she be not made a party to the deed, if she be taken as a consenter in the testing clause (*Johnstone*, 1843, 5 D. 1297: *Dunlop*, 1863, 2 M. 1: affd. 3 M. (H. L.) 46). Mere subscription of the deed by the wife would, it is thought, be sufficient. (See Ld. Medwyn, *Johnstone, supra*, at p. 1311; Ld. Deas, *Smith*, 1877, 5 R. 112; Ld. Watson, *Blair*, 1896, App. Ca. 409, at p. 425.) Cf. *Taylor*, 1748, Mor. 16813; *Orr*, 1712, Mor. 16919—cases of subscription by cautioners). For the effect of consent by a wife as barring her from subsequently claiming her legal rights, see *Johnstone* and *Dunlop, supra*; *Leighton*, 1852, 15 D. 126. See also . . . . . .

This effect of consent has no analogy in judicial procedure. A party's title to sue which is merely defective or qualified by some limitation, may be cured by obtaining the consent and concurrence of the person by whose right his is qualified: but where a principal party to a suit has no interest or right of his own, this want cannot be supplied by the consent and concurrence of the person in whom alone the right of action is vested (*Hislop*, 1881, 8 R. (H. L.) 95, Ld. Watson, p. 105). See TITLE TO SUE.

Consequential Damages.—See DAMAGES.

Consideration.—In its widest sense, consideration denotes the cause or reason for granting a deed or entering into a contract. It may be gratuitous, as where a deed is said to be granted for the "love, favour, and affection" borne by the granter towards the grantee: or onerous or valid, as in the case of a contract. As was said in an English case, "a valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other" (*Currie*, 1875, L. R. 10 Ex. 162). By being valid or onerous, it is not meant that the consideration should be adequate, as to which the law does not concern itself (*Westlake*, 1858, 5 C. B. (N. S.) 248, 265). "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give" (Hobbes, *Leviathan*, Part i. c. 15). Where, however, the validity of a contract is challenged, inadequacy of consideration, coupled with other things, may afford evidence of fraud or circumvention. In England, a promise, where not contained in a deed under seal, is not binding, unless made in return for a valid consideration given by the promiser: but in Scotland, promises are effectual though gratuitous. For a systematic treatment of the doctrine of consideration, reference must be made to English treatises and decisions. "The English system of law, as distinguished from those of the Continent, and even of Scotland, is the only one in which the notion is fully developed" (Pollock on *Contracts*, 9: and see pp. 164 *seq.*, and cases there cited). As to the effect of the consideration given by one contracting party to another being illegal or impossible, see under CONTRACT: OBLIGATION: ILLEGAL CONTRACT.

Consignation is the term applied to the deposit of money, which is the subject of dispute or competition, in the hands of a neutral person, by whom it shall be delivered up to the party or parties to whom it shall be adjudged. The occasions for consignation are: (1) In wadsets, where the reverser is bound to consign in the event of the wadsetter not appearing at the time and place to which he is cited by the premonition, or if he refuse to accept of payment and to renounce. In such a case, the reverser must take a notarial instrument of consignation, which instrument completes the order of redemption, stops further interest from running against him, subjects the wadsetter to account for the rents of the wadset-lands from the time the order was used, and founds the reverser in an action for declaring the order to be formal, and the lands to be redeemed in consequence of it (Ersk. ii. 8. 19). (2) In multiplepoindings and judicial sales, where it is not finally determined to whom the money is to be paid. (3) In suspensions, consignation is competent in place of caution. Consignation of the sum charged for, however, is not sufficient to warrant the note being passed, if the respondent object, unless caution for expenses be found (*Paul*, 1867, 5 M. 1120). In practice, caution for expenses is rarely exacted where consignation has been made (Mackay, *Manual*, p. 432).

The risk or periculum of the consigned money falls on the party who is at fault. It falls on the consignee, if he had no good reason to consign, or if the consignation is irregular,—as for example, where he consigns a part only of the money due,—or if he chooses an improper person as consignatary. If, however, the consigner has just ground for consigning, if the consignation is regular, and the consignatary a proper person, the risk falls on the wadsetter, seller, or other creditor (Ersk. iii. 1. 31).

It is the duty of the consignatary to keep the money consigned in safe

keeping till it is called for; it is not his duty to put it out at interest, and if he does so, it is at his own risk; it is considered by Erskine that if he invests the consigned money successfully, he is entitled to keep the interest to himself (Ersk. iii. 1. 31), but this doctrine is at least questionable. As, however, consigned money is now deposited in banks, the value of the doctrine is of little importance. By 19 & 20 Vict. c. 91, s. 2, it is provided that in every case of a judicial sale it shall be lawful for the purchaser to lodge the price, with the interest due on it, in any joint-stock bank in Scotland, by doing which, and by giving due notice thereof to the agent who carried on the sale, he shall be discharged of the said price; and further, the Court of Session, upon the application of any of the creditors, shall be empowered to make an order on the purchaser to lodge the price and interest in one of the said banks, sufficient intimation being always given to the purchaser, and to the common agent for the creditors, that such application has been made, in order that all parties may have an opportunity to object. And by 20 & 21 Vict. c. 18, s. 5, it is provided that all monies deposited in the Bill Chamber shall be forthwith deposited by the Clerk of the Bills in one of the banks in Edinburgh. The Court of Session Consignations (Scotland) Act, 1895 (58 & 59 Vict. c. 19), provides that in future the Accountant of Court shall be the sole custodier of all consignations under the Act, and that he shall, within ten days of the receipt of any consigned money, lodge the same on deposit receipt in one of the Scottish banks. This Act has been read as applying only to money consigned in causes or proceedings in Court (*Antrobus*, 1896, 4 S. L. T. 143).

[Stair, i. 13. 6, and i. 18. 4; Ersk. iii. 1. 31, ii. 12. 63, ii. 8. 19; Bell, *Prin.* s. 215: Mackay, *Practice*, ii. 188.]

Consignment.—This term is used in a general sense to indicate the transmission of goods, usually from abroad, through the medium of a carrier, as, *e.g.*, under a bill of lading endorsed and delivered, whether the intention be to pass the entire property in the goods to the consignee, or only to give him a security to cover advances. More usually, as a term of mercantile law, it is applied to the arrangement whereby goods are placed by one merchant in the hands of another, or by a merchant in the hands of a mercantile agent or factor, for some specified purpose—commonly for sale. The rights and liabilities of the parties *inter se* depend mainly on the purpose for which the consignment is made.

Where the goods are consigned for sale, the factor or consignee is bound, in a question with the consignor, by any instructions given by the latter as to the price at which the goods are to be sold. Where they are consigned for sale generally, and without such instructions, the consignee has an implied mandate empowering him to sell at his discretion as to time and price, and his liability to the consignor is only for the proceeds actually realised from the sale (*O'Reilly, Hill, & Co.*, 1821, 1 S. 61; Bell, *Com.* i. 509). The consignee of goods for sale has the common law rights of a factor, including a lien on the goods for the balance of his account with his principal, and a power to pledge. And if, as is usual, he is a "mercantile agent" in the sense of the Factors Act, he is subject to the provisions of that Act as regards the selling, pledging, or otherwise disposing of goods by mercantile agents (52 & 53 Vict. c. 45, extended to Scotland by 53 & 54 Vict. c. 40, s. 1). See AGENCY; REPUTED OWNERSHIP; FACTOR.

It is a common practice for the consignee to advance money to the

consignor, or to accept his bills, on the faith of the goods consigned. Such advances are covered to their whole amount by the factor's lien (see FACTOR'S LIEN), and the consignee is thus placed in the position not only of an agent for the consignor, but of a creditor holding a security for his own debt. A mandate to sell the goods may in such case be exercised by the consignee as *mandatum in rem suam*, so as to realise a fund for the extinction of the debt (Bell, *Com.* ii. 12). The mandate subsists, and may be assigned, until the consignee is reimbursed. So, where goods are consigned under a bill of lading, not for sale but in security of advances, the property passes to the consignee to the effect of enabling him to operate payment out of the security subjects, with liability to account to the consignor for the balance (see BILL OF LADING). The case where goods are consigned by a person, not himself the owner, but one who has had the possession of them given to him by the owner for the purpose of consignment or sale, is specially dealt with by the Factors Act (s. 7), which provides that in such case the consignee who has not had notice that the consignor is not the owner, has, in respect of advances made to or for the owner, the same lien on the goods as if the consignor were the owner; and the consignee may transfer any such lien to another person.

On the bankruptcy of either party, or of both, questions may arise as to their respective rights in the goods consigned. The following general rules are applicable: If the consignee or factor becomes bankrupt, and the consignor has to pay the bills drawn on the consignee, he may recover the goods, so far as they are still unsold, as his own unalienated property. On the consignor's bankruptcy, the consignee has his lien on the goods to the amount of all obligations undertaken on the faith of them. Where both parties become bankrupt, the holder of their bills may rank on the estates of both for the full amount of his claim, to the effect of receiving full payment on the whole; the consignee's lien is available against the consignor's estate for relief and indemnification; and the goods may be recovered by the consignor's estate after such relief, or on full security being given for it to the consignee and his estate (Bell, *Com.* i. 294). The same rules are applied where goods have been consigned, not for sale, but to a creditor in security of his debt (*Royal Bank*, 1881, 8 R. 805; affd. 1882, 9 R. (H. L.) 67).

Questions of a different kind arise where goods have been consigned through a general consignee or factor in security of debts due to other persons, creditors of the consignor, or with instructions that the proceeds from the sale of the goods may be paid to these creditors. Here the consignor's bankruptcy may raise the question whether a creditor has an effectual security in the goods or their proceeds, so as to prevent the consignor from recalling his mandate, and to bar diligence by his general creditors. This depends entirely on the specific appropriation of the goods to the creditor indicated (Bell, *Com.* ii. 12). See SPECIFIC APPROPRIATION. The consignee cannot plead his lien on the goods in prejudice of the creditors to whom the goods have been thus appropriated.

The legal relations of the parties, so far as arising out of the contract for the transmission of the goods, are a part of the law of carriage. See CARRIER. As to the special position of the consignee of goods under a bill of lading, see BILL OF LADING; FREIGHT; DEMURRAGE; STOPPAGE IN TRANSITU.

Consistorial Actions.—This term was at one time used to denote all actions which fell within the jurisdiction of the ECCLESIASTICAL

COURTS or the COMMISSARY COURT (*q.v.*). It is now in practice limited to those actions which spring out of the relation of husband and wife. These are enumerated in sec. 19 of the Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86). They are "actions of declarator of marriage, of declarator of nullity of marriage, of declarator of legitimacy and bastardy, actions of separation *a mensa et thoro*, of divorce and of adherence, and of putting to silence, and actions of aliment between husband and wife, instituted in the Court of Session." With the exception, which is only apparent, of certain actions of ALIMENT (*q.v.*), consistorial actions are competent only in the Court of Session. And as they involve rights which are *publici juris*, proof is necessary though there is no defence (1 Will. IV. c. 69, ss. 33 and 36; 13 & 14 Vict. c. 36, s. 16). A defender may be allowed to appear though no defences have been lodged (*Watts*, 1885, 12 R. 894; *Paterson*, 1848, 20 Sc. Jur. 459). And a special defence to divorce, such as condonation, would be allowed to be lodged, even after the proof, if decree had not been signed (*Paul*, 1896, 4 S. L. T. 193). The summons may be signed either by a Clerk of the Court of Session or by a writer to the Signet (13 & 14 Vict. c. 36, s. 15; 31 & 32 Vict. c. 100, s. 13; *Craig*, 1851, 14 D. 261). There must be service upon the defender when he is not resident in Scotland. But if it be shown to the satisfaction of the Court that the defender cannot be found, edictal citation shall be deemed sufficient. But in this case the summons must be served also "on the children of the marriage, if any, and on one or more of the next-of-kin of the defender, exclusive of the children of the marriage, when the said children and next-of-kin are known and resident within the United Kingdom, and such children and next-of-kin, whether cited or so resident or not, may appear and state defences to the action" (24 & 25 Vict. c. 86, s. 10). Personal service need not be by a messenger-at-arms (31 & 32 Vict. c. 100, s. 100). See CITATION; SERVICE; *Laughland*, 1882, 19 S. L. R. 645. Proof in consistorial actions is taken before a Lord Ordinary. The examination of havers or witnesses may be, as in other cases, taken by COMMISSION (*q.v.*; 24 & 25 Vict. c. 86, s. 13). But commission cannot be granted to take the whole evidence. The parties are now competent witnesses (37 & 38 Vict. c. 64, s. 2). The law agent of a party is a competent witness, except in actions of declarator of marriage founded on promise *cum copula subsequute* (15 Vict. c. 27, s. 1; 16 Vict. c. 20, s. 2; 37 & 38 Vict. c. 64, ss. 1, 3; see Dickson on *Evidence*, ii. 1576. The repeal of sec. 1 of 37 & 38 Vict. c. 64, by the Statute Law Revision Act, 1883, does not, by sec. 1 of the last-named Act, revive the old rule). Diligence on the dependence of a consistorial cause is not competent unless there are pecuniary conclusions (*Ketchen*, 1871, 9 M. 966). And where the claim is for aliment for the future, diligence is incompetent unless the husband is *vergens ad inopiam*, is *in meditatione fugæ*, or is putting away his funds (*Symington*, 1875, 3 R. 205; *Burns*, 1879, 7 R. 355). A reference to oath may be refused where the interest of third parties might be prejudiced (*Longworth*, 3 M. 654, 5 M. (H. L.) 144; Fraser, *H. & W.* ii. 1243; 16 & 17 Vict. c. 20, s. 5). As a rule, neither the pursuer nor the defender, where resident out of the jurisdiction, will be required to sist a mandatary (*Campbell*, 1854, 17 D. 514; *D'Ernesti*, 1882, 9 R. 655). Reduction of a decree in absence is competent, at any rate within year and day (*Stewart*, 1863, 1 M. 449). It is not clear whether the rule of the Consistorial Court, excluding reduction after year and day, applies to the Court of Session (see 31 & 32 Vict. c. 100, s. 24; narrative to *Harvey*, 1872, 2 Paterson, at p. 1992; *Lockyer*, 1876, 3 R. 882, 1877, 4 R. (H. L.) 32; Fraser, *H. & W.* ii. 1230). But lapse of time would not bar a reduction on the ground of fraud, if the action were

brought without undue delay after discovery of the fraud (see opinions in *Lockyer*, 4 R. (H. L.), at pp. 39 and 43, and *Begg*, 1889, 16 R. 550). In exceptional cases reponing may be allowed (*Whyte*, 1891, 18 R. 469).

[See Mackay, *Manual*, 468; Walton, *H. & W.* 113 and 316–323.]

Consistorial Court.—See Commissary Court.

Consolidation is the term used, in the feudal system of land rights, to describe the union of what were previously two separate estates in the same lands. The two estates must be in immediate sequence in the feudal chain; but, so long as that condition is observed, the process applies not only to the *dominium utile* and the immediate superiority thereof, but also to any two estates of superiority or mid-superiority. This is expressly recognised in sec. 6 of the 1874 Act and relative Schedule C.

It was originally thought that when the two fees came to be vested in one person, consolidation operated automatically. Indeed, when it was the case of the superior acquiring the property by succession to his vassal, it was thought that he did not require even to make up any title as heir. It was not until 1786 (*Bald*, M. 15084) that it was authoritatively settled that there was no such thing as *ipso jure* consolidation, but that the two fees remained distinct until consolidation was effected by one or other of the methods about to be explained.

Until 1874, consolidation might be effected in either of two ways: (1) resignation *ad remanentiam*, and (2) prescription.

Consolidation by Resignation.—It was, and is, essential that the titles both of superior and vassal should be complete (*Grant*, 1786, Mor. 8740). If the superior purchased the property, the original form of deed was a procuratory of resignation *ad rem.*, followed by an instrument of resignation *ad rem.*, which required to be recorded within sixty days of its date (1669, c. 3). For forms, see *Juridical Styles*, 4th ed., i. 143. The short form of clause of resignation introduced by the 1847 Act in dispositions between vassal and superior did not apply to the separate procuratory of resignation. Down to 1845 there was a ceremony of resignation by the vassal or his procurator in presence of the superior or his commissioner before a notary public and two witnesses. The symbols were described as "staff and baton," which in fact meant a pen. The 1845 Act (8 & 9 Vict. c. 35, s. 8) authorised the superior's known agent to receive resignations, and the long notarial docquet was abolished in the instrument. The instrument was further simplified by the 1858 Act (21 & 22 Vict. c. 76, Sched. D), which also permitted registration at any time within the lifetime of the person on whose behalf the instrument was recorded. But, as explained below, the use of the instrument was optional after 1858.

An alternative to the procuratory of resignation was a disposition of the property, with a clause of resignation *ad rem.*, in the following terms:—

> And to the effect that my right of property of the said lands may be consolidated with the said *B.* his right of superiority of the same, I hereby bind and oblige me, my heirs and successors, to make due and lawful resignation of the same in the hands of the said *B.*, as my immediate lawful superior thereof *ad perpetuam remanentiam*: And for that end I hereby make . . . . . and each of them my very lawful and undoubted procurators, for me and in my name to compear before the said *B.*, my immediate lawful superior of the said lands, or his commissioner in his name having power to receive resignations *ad perpetuam remanentiam*, at any time and place lawful and convenient, and there with all due reverence and humility, purely and simply by staff

and baton, as use is, to resign and surrender, as I do hereby resign, surrender, *simpliciter* upgive, overgive, and deliver All and Whole [*description*] in the hands of the said *B.* or of his commissioner in his name and for his behoof *ad perpetuam remanentiam*, to the effect that the right of property in the said lands which stands in my person may be established and consolidated in the person of the said *B.* with his right of superiority of the same, and remain inseparable therefrom in all time coming.

The deed contained no obligation to infeft and no precept of sasine. Its peculiarity was the special clause of resignation *ad perpetuam remanentiam*. The 1847 Act (10 & 11 Vict. c. 48, s. 3, Sched. A) introduced the short clause of resignation in the words "and I resign the said lands and others for new infeftment," which were declared, "in the case of conveyances by a vassal to his superior, equivalent to a procuratory of resignation *ad rem.*" This was altered by the 1858 Act, which (s. 5) provided that the clause of resignation should be held to be *in favorem* only, unless it expressly bore to be *ad rem.*; but, to avoid difficulty as to indefinite resignations contained in dispositions executed between 1847 and 1858, it was provided that any such, if granted by vassal to superior, should form a good warrant for an instrument of resignation *ad rem.* It is to be understood that down to 1858 the disposition with clause of resignation *ad rem.* (express or implied) required to be followed by an instrument, just as was the case when a separate procuratory was used.

In accordance with the general rule of abolishing instruments adopted in 1858, the Act of that year (s. 4) declared it unnecessary to expede an instrument of resignation *ad rem.*, and allowed the procuratory of resignation *ad rem.*, or disposition with clause of resignation *expressly ad rem.*, to be recorded with a warrant. A notarial instrument was allowed as a substitute, if desired.

The disposition with clause of resignation was most appropriate when the superior purchased the property from the vassal. In the converse case the vassal obtained an ordinary disposition of the superiority, completed his title thereto, and could thereupon proceed to grant in his own favour either a disposition of the property with clause of resignation *ad rem.*, or a separate procuratory of resignation *ad rem.*: but the latter was the more appropriate, as it also was when either the superior succeeded to the property or *vice versâ*. It is to be understood that neither was the disposition confined to cases where two persons were involved, nor the separate procuratory to cases where there was only one.

Consolidation by Prescription.—This expression is used in different meanings. It may mean either the *acquisition* by the superior, by force of prescriptive possession, of the *dominium utile*, and the incorporation thereof with the superiority estate, or simply the consolidation of two fees all along vested in the same person. There is also a case between these two, viz. where, though both fees belonged at the commencement of the prescriptive period to the same person, he held one on an absolute and the other on a limited title. In that case he represents two interests in his own person, and there is thus room not only for consolidation, but also for *quasi*-acquisition. To illustrate the three cases—

1. A. is superior on a title *ex facie* embracing the lands, and B. is vassal. A. possesses the lands themselves for the prescriptive period, to the exclusion of B. The result is that, by force of the positive prescription, A.'s title now covers the *plenum dominium* as one consolidated estate, and B.'s right is extinguished. *Middleton* (1774, Mor. 10944) is cited as an authority. The *Elibank* case (1833, 12 S. 74) is also in point, in view of the *dicta* of the judges, to the effect that the consolidation would have been clear

beyond question if no reconveyance had been granted by the holder of the base right. It is essential that A.'s infeftment should on the face of it be a title to the lands; it would not be sufficient if it were expressly limited to "the superiority" or "the *dominium directum*." When the infeftment is in the lands, the requirements of the Statute 1617, c. 12, and of the 1874 Act, are fulfilled, viz. (*a*) an *ex facie* valid title, and (*b*) possession in terms thereof. But if the infeftment were in "the superiority," then the possession of the *dominium utile* would be, not in terms of the title, but in face of it. In this case of prescriptive consolidation, difficulties might now arise in connection with warrandice. Prior to 1874 that could not be, for it then required forty years' possession to perfect the superior's title by force of the positive prescription, and the same period would extinguish the claim of warrandice by the negative prescription. But now that the positive prescription is limited to twenty years, the warrandice survives, though of course it gives merely a personal claim, and only against the granter of the obligation of warrandice and his representatives.

2. A. holds both superiority (*ex facie* the lands) and property, the one on a limited title and the other unlimited. At the outset, it is to be observed that this is not a proper case of double titles. That expression means two titles to the same fee; but here there are two fees as well as two titles.

First, let it be supposed that the superiority is entailed and the property fee-simple (*Elibank, supra*: *Bontine*, 1837, 15 S. 711: and *E. Glasgow*, 1887, 14 R. 419). As is explained afterwards, the effect of prescriptive consolidation is to bring the property within the fetters of the superiority entail. Accordingly, the law, favouring freedom, gives a presumption here against consolidation. The question is whether the evidence is such as to displace this presumption and to show possession of the lands on the entailed superiority title. The mere fact that that title has been completed while the property title has not, is not enough; for apparency was, and the statutory personal right now is, a sufficient title (*E. Glasgow*). In the *Elibank* case the circumstances were that a base fee of a part of the estate had been created, apparently for political purposes; there never was any possession thereon; and a reconveyance was granted, but never feudalised. The deed of entail subsequently granted showed an intention to include the *dominium utile* of the part in question. The heirs of entail made up no title except under the entail, and there were unequivocal acts referring the possession to the entail title. It was held that consolidation had resulted. It is sometimes said that it is irrelevant to consider the purpose for which the splitting of superiority and property may have been brought about, but a perusal of the *Elibank* case makes it plain that the judges attached the greatest weight to the fact that, in truth, there never was intended to be a substantive title by subinfeudation. In *E. Glasgow's* case (where it was held that there was no consolidation) the point of distinction was also taken, that in the *Elibank* case consolidation was supported by an obligation in the entail to possess under that title, and to use all other titles in corroboration only. That argument might be entitled to weight taken in conjunction with the intention evinced by the entailer to include the *dominium utile*: but, apart from that, it is suggested that such a clause would not affect the question, for at most it imposes an express obligation against prejudicing or curtailing the entail, but not a duty to extend it.

Second, the converse case is that of a fee-simple superiority and an entailed property (*Bruce*, 1770, Mor. 10805). The considerations which go to decide the other case have no application here. The *intention* of the property owner to consolidate in fee-simple with the fee-simple superiority

cannot be the rule of decision, for his powers are inadequate and his obligations prohibitory. And as to the presumption in favour of liberty, the proper application of that is to preserve the liberty of one's own estate; it is quite another thing to seek to apply it to extinguish the estate of another. The rule of this case must simply be an ordinary application of the Statute 1617, c. 12, as modified by the 1874 Act. Any of the subsequent heirs of entail is entitled to challenge the possession during the prescriptive period: and if, notwithstanding, the facts come up to possession of the lands for that period on the fee-simple title (originally truly superiority, but *ex facie* including the lands), then the statutory conditions have been fulfilled. But here again there may be questions of warrandice.

3. A. holds both superiority (*ex facie* the lands) and property, and both on unlimited titles. It is presumed that the possession has been on the superiority title, and when it has endured for the prescriptive period consolidation is effected (*Walker*, 1827, 5 S. 469: *Wilson*, 1839, 2 D. 159). This has been attacked on the ground that it is inconsistent with the rule applied to proper double titles. That rule is that, when a man has right under *e.g.* a marriage contract, and is also heir of the same fee under the last investiture, and makes up titles in the latter capacity only, not even forty years' possession will extinguish the personal title which, on the lines of descent diverging, will be the ruling destination if no alteration has been effectually made (*Gray*, 1752, Mor. 10803: *Zuille*, 4 Mar. 1813, F. C.). This rests upon the grounds that the special destination prevails over the law of intestate succession, and over any earlier destination: that it endures till altered; that a man is entitled, and is to be presumed, to possess on and found upon all his titles to defend his estate: and that therefore the special destination is not evacuated merely by taking up a secondary title. The case of separate fees of superiority and property is not within the region of these considerations, and the contrary (or at least a different) result is reached, on the ground of intention presumed from the supposed interest of the proprietor to simplify his title. But it is suggested that there might be such facts connected with the two titles, and the possession of the fees as referable thereto respectively, as would prevent consolidation operating. Thus assuming that two concurrent series of separate titles to the respective fees have been made up in this separate form from time to time all through the prescriptive period, it is submitted that that would be practically inconsistent with the application of the Statutes.

It will be observed that if the separate fees are held under identical destination, the question of *title* is alone immediately involved, though no doubt that may be attended with serious consequences to third parties. But another case arises if the destinations are different, for the matter of *right* is then raised *inter hæredes*. It was suggested (per Ld. Mackenzie in *Wilson's* case) that consolidation is restricted to the case of identical destinations: but that cannot be maintained universally (*Dalrymple*, 1841, 3 D. 837). In this latter case the superiority was destined to heirs-general, and the property to heirs-male: the latter title was not made up; infeftment was taken in the superiority: and subsequently there was forty years' possession: held that there was consolidation. This competition of destinations is assimilated to the case of limited and unlimited titles. Thus in *Dalrymple* Lord Cuninghame said: "It was obviously the interest of the Earls of Stair to ascribe their possession to their title of superiority rather than to the conveyance of the *dominium utile*. The title of superiority was the more unlimited of the two rights, as Linn's conveyance of the superiority was to heirs whatsoever, while Lord Bargany's disposition of the property

was limited to heirs-male." As regards possession by persons who had themselves succeeded under (and did not themselves make) the special destination, this result is consistent with the principle of freedom. But suppose the proprietor of the superiority purchases the property, and himself prescribes the special destination, there appears to be neither principle nor authority for holding that his clear expressed intention must yield to implication.

If, on the other hand, it is the property which is destined to heirs-general, and the superiority is held under a special destination, the same rule which in *Dalrymple* worked for consolidation would work against that result.

On all these questions there are two things to be regarded: (1) title, and (2) possession. The taking up and completing of a title may be inconsistent with the idea that it has been abandoned, but the neglect to do so does not support the conclusion of abandonment (*E. Glasgow*). Most important of all, however, is the real evidence of facts and circumstances as showing possession *de facto* on one title or on the other.

Consolidation by Minute.—The Act of 1874 has introduced a new method of consolidation, viz. by minute of consolidation recorded in the Register of Sasines (see sec. 6 and Schedule C). The titles must first be complete. The form is extremely simple, and in practice no other method ought to be followed. But, further, it has been suggested that consolidation by resignation is now incompetent. It is difficult to see any ground for that view. Sec. 4 of the Act bears to abolish renewal of investiture (which consolidation is not), and declares that "it shall not be competent for the superior" to grant any "writ by progress," which it is submitted a procuratory of resignation is not, even if the superior granted it, which he does not. And, besides, sec. 7 expressly speaks of "consolidation under this Act *or otherwise*."

The Effects of Consolidation may be considered under the following divisions:—

1. *Title.*—There are certain expressions in the authorities to the effect that consolidation extinguishes the property fee; but these are liable to be misunderstood. Bell (*Prin.* 788) writes: "Resignation *ad rem.* is to be distinguished from a renunciation. The vassal's estate is not a burden to be thrown off, but an estate of which the conveyance is completed by a ceremony strictly feudal and equivalent to sasine." In *E. Zetland* (1870, 8 M. (H. L.) 144), Lord Westbury pointed out the difference in effect between consolidation and merger under the law of England. He said: "A thing surrendered by English law so as to produce a merger is lost and destroyed. A thing resigned in Scots law *ad per rem.*, if it be a subject in which the *dominium utile* has been granted, is restored to the superior. It is again conjoined to the thing from which it was taken as an integral part thereof, to remain conjoined with it for ever." Of course the separate existence of the property fee is brought to an end by the fact of union or consolidation: but apart from the effect of prescription, it appears incorrect to say that the fee is extinguished, or (at least universally) that the original superiority title is, after consolidation, the only title to the united estates. In the first place, that is directly at variance with the very words of the resignation (*supra*, p. 221): "the right of property" cannot "be established" and "remain for ever" (*ad perpetuam remanentiam*) after *ex hypothesi* it has been extinguished and destroyed. Further, the resignation may be made under a reserved burden, to which burden a power of sale may be attached (*Wilson*, 1822, 1 S. 316; affd. 1824, 2 Sh. App. 162), which could not be if there were nothing to which to attach the reservation, and therefore nothing which could be sold under the power. Then, more directly as to title, suppose the

superiority title is expressly limited to "the superiority," and that consolidation is effectually carried out by resignation or by minute: if the property fee and title were destroyed, nothing would be left but a bare superiority, and a title absolutely so limited. In such a case it seems clear that the proprietor's title is his two infeftments *plus* the procuratory or minute. Certainly no one would risk making up the title of the heir or a general disponee on the superiority infeftment only. And this suggests whether, for greater security, the same practice should not be followed in all cases, even though the superiority title *ex facie* embraces the lands.

The case of *E. Zetland* suggests a further question regarding the property title and the exact effect of consolidation thereon. Let it be supposed that that title embraces some right which is not in the superiority title: is it to be held that consolidation forfeits that right? and if not, on what title does it stand after consolidation? In *E. Zetland's* case the property title embraced salmon fishings, while the superiority title did not; and consolidation having been effected by resignation, it was contended that the superiority title alone remained in force, and that the right to salmon fishings had therefore been lost. This contention was negatived. Lord Colonsay said: "I do not see how consolidation could lose to him the right of fishing which he had acquired." Then what is the title? If the fishings be treated as within the consolidation, this must be a case in which the property title remains in force notwithstanding consolidation. An alternative view is that, *quoad* the fishings, there had been and could be no consolidation, inasmuch as consolidation presupposes and demands the previous existence of the two fees, and here there was only one so far as regards the fishings.

2. *Destination.*—From the fact that after consolidation there is but one united fee, it follows that another effect of consolidation is, that the destination of what was formerly only the superiority rules the descent of the united estate until effectually altered (*Park*, 1870, 8 M. 671). Such a matter as the salmon fishings in *E. Zetland's* case (*supra*) might be in a special position if the destinations of the two estates were not identical. But even there, and even assuming that the consolidation were held not to extend to the fishings, the analogy of the old case of *Greenock* (1736, Mor. 5612) might prevent them being separated from the lands. The matters dealt with in the next two paragraphs are perhaps to be regarded as exceptions to, or qualifications of, this rule as to destination.

3. *Double Superiority Titles.*—If the superiority be held under double titles, the question arises how the above rule as to the effect of consolidation on the destination is to be applied. Suppose the superior is heir of the superiority fee both under a special settlement and under the old investiture, it has been seen (p. 224) that, even though he makes up title under the latter, the former will be the ruling title of the superiority fee. But suppose the superior, after making up his title under the old investiture, acquires the property and consolidates, is the heir under the special destination of the superiority to take the *plenum dominium*? In *Pattison* (1866, 4 M. 1104; affd. 6 M. (H. L.) 147) this result was negatived. It was held that the real rights of the parties were, that the heirs of the investiture were entitled to the property, and the heirs of the special settlement to the superiority. That result was carried out by holding that the legal combined fee descended to the heirs of the investiture, subject to a claim at the instance of the heirs of the special settlement to have a separation of the fees, the superiority estate being again set up as previously existing and then made over to them. This result was not arrived at without much difficulty and difference of opinion in both Courts.

4. *Heritage and Conquest.*—There is no modern decision on the effect of consolidation as between the heir in heritage and the heir of conquest, in successions opening prior to the 1874 Act, where the ancestor had succeeded to the one fee and had purchased the other. There is indeed a case (*E. Selkirk*, 1760, Elchies, Heritage and Conquest, No. 3) in which it was held "that the defunct purchasing the property of lands whereof he was superior, expressly in order to consolidate the property and superiority together, the property descends to the heir of line who is heir in the superiority; and the Lords were of the same opinion, though the intention had not been expressed." Here there seems to have been no actual consolidation. This was before it was definitely settled that there could be no *ipso jure* consolidation (see p. 221). And *quid juris* if the position of the fees had been reversed? The heir of conquest was entitled only to estate to which the ancestor had not himself succeeded as heir; and it is at least not clear that, even after express consolidation, he could have carried off the united fees, notwithstanding that the property had been inherited by the ancestor, simply because the latter had purchased the superiority. A solution might have been found on lines similar to those followed in *Pattison, supra.*

5. *Entailed Superiority.*—Assuming that the superiority fee is held under an entail, while the property was held in fee-simple, the question arises whether the property is by consolidation subjected to the fetters of the entail beyond recal. The answer is, that that effect is not produced except by force of prescription. If the consolidation have been by prescription, the cases of *Elibank* and *Bontine* (*supra*, p. 223) are authorities for holding that the property is irrevocably dedicated to the entail. If, on the other hand, the consolidation have been by resignation, or now by minute, the entail fetters do not reach the property fee until the force of prescription has been superadded (*Heron*, 1733, 1 Paton's App. 98; *Galbraith*, 1814, F. C.). This distinction between the effect of consolidation by prescription and by feudal method turns on the statutory requirements to the constitution of a strict entail. The *dominium utile* is either fee-simple or it is entailed. If the latter, it can only be because the entail requirements have been fulfilled as regards prohibitory, irritant, and resolutive clauses (or their equivalent), and registration. In that case the property would be held under the entail, and *Heron* and *Galbraith* would not apply. But otherwise the necessary result is that the entail is effectual only as regards the superiority, and the property is held in fee-simple (Duff, *Feud. Conecy.* 493). If, however, after consolidation, the *dominium utile* be possessed for the prescriptive period on the consolidated title (*ex facie* embracing the lands), the 1617 and 1874 Acts would sustain the entail title to the full extent of its terms, and therefore result in the extension of the fetters to the property. If, on the other hand, the superiority title were expressly a title to the superiority only, a different question would be raised. Apart from the question of entail fetters, that would be no bar to effectual consolidation by resignation, or now by minute, but, on the other hand, it has been seen that it would prevent consolidation resulting from prescription. The question is whether, there being express consolidation by resignation or by minute, prescriptive possession will ever make an effectual property entail. It is thought that it would not. The efficacy of the entail is *ex hypothesi* limited by the entailing instrument to the superiority, and therefore cannot reach to fetter the property unless possession is available and competent to extend its scope; but that cannot be, for it has been already seen that,

by our law of prescription, possession is not allowed to contradict the title.

When, notwithstanding the consolidation, the property does not fall under the fetters of the entail, the only form in which the heirs of entail can vindicate it as fee-simple is by reconstituting the feu.

6. *The Over-Superior's Position.*—Sec. 7 of the 1874 Act provides that "no consolidation that may be effected . . . . shall in any way affect or extend the rights or interests of any over-superior, or entitle him to any more than the duties or casualties to which he would have been entitled had there been no consolidation."

Conspiracy.—At common law it is criminal to conspire for the purpose of committing crime. Hume says (i. 170) that "process is properly brought under this generic name, for any sort of conspiracy or machination directed against the fame, safety, or state of another, and meant to be accomplished by the aid of subdolous and deceitful contrivances, to the disguise or suppression of the truth." Thus it is criminal to conspire to accuse others falsely of crime (cases of *Muschet* and *Elliot*, Hume i. 170, 171). It is a crime to conspire to murder, or to conspire to commit housebreaking (*Burnett*, 231, and cases in note). It is also criminal to conspire to extort money (*Scott* and *Maxwell*, Hume, i. 342). Conspiring to intimidate workmen, by violence or by threats, is criminal. It is also a crime to conspire to raise wages by illegal means (*Burnett*, 225–237, and cases there; *Hunter*, 1837 and 1838, 1 Swin. 550, and 2 Swin. 1; *Sprot & Others*, 1844, 2 Broun, 179). Burnett is of opinion (p. 237) that a "combination among the masters or employers to depress the price of labour, or even to keep it at the current rate," is an indictable offence. It is obvious, however, that such a combination would become criminal only when violence or threats were employed to effect its object.

It is a crime at common law to procure one individual to personate another, so as to defeat or obstruct the administration of justice (*Rae* and *Little*, 1845, 2 Broun, 476). It is a good common-law charge, if no Statute expressly excludes it, to indict for conspiracy to effect an alteration of the laws and constitution of the realm by force and violence, or by armed resistance to lawful authority (*Cumming & Others*, 1848, J. Shaw, 17).

The punishment of the common-law crime of conspiracy is an arbitrary one.

Intimidation of working-men is dealt with by the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86, s. 7).

[Macdonald, 245; Anderson, *Crim. Law*, 52.]

Constable.—The word, according to Lambard, is derived from the Saxon Konig-Stapel, the strength of the kingdom; according to Spelman, Cowel, and Blackstone (through the medium of the French), from the Latin *comes stabuli*, so called from his regulating tournaments and other feats of arms which were performed on horseback. The constable was an officer of great power and high rank in feudal times, and appears from the 6th chapter of the laws of Malcolm II., which mentions his fees, to have been well known in Scotland. The lower constableship, says Lambard, "was at first drawn and fetched from the other, and is, as it were, a very finger of that hand" (Lambard, *Of Constables*, v.). The first Statute which regulates the office of constable in Scotland is the 8th Act of the 22nd Par-

liament of James VI. (1617), intituled "Anent the Justices for keeping the King's Majestie's Peace and their Constable." This Act was ratified by the Act 1633, first Parliament of Charles I., continued by Order of Council during the Protectorate, 1657, and finally renewed and amended by the 38th Act of the first Parliament of Charles II., 1661: "Commission and Instructions to the Justices and Constables." The regulations there laid down are as follows:—

1. The constables are to be chosen by the justices of the peace at their quarter sessions throughout the whole country, two at least in every parish, and more if they find it necessary, according to the extent of the parish. In all great towns, likewise, which are not cities or free boroughs, the justices are to appoint a number of constables in proportion to their extent: but in all royal boroughs and free cities the constables are to be chosen by the magistrates of the same, who are to endure, and be changed from six to six months. And whoever shall refuse to accept this charge, or to give his oath for faithful execution of the office, may be imprisoned and fined at the discretion of the justices of peace at their next sitting.

2. All the constables, or at least one of every parish, intrusted with power to answer for the rest within the said parish, are to attend at every quarter sessions, to give information of all breaches of the peace and other misdemeanours which have happened within their bounds since the preceding sessions, and have come to their knowledge. These they are bound not to conceal, nor any of the proofs and evidences concerning them, and, in short, to give the Bench every information which is necessary and within their power. And they are to receive from the justices, at the end of the session, such orders and directions as they shall then think fit to enjoin.

3. Constables, in their respective parishes, are to apprehend suspicious persons who are night-walkers, or, as the Act 1617 expresses it, "any suspect man, who for the most part sleepeth all day and walketh all night," and who cannot give a good account of themselves, and carry them to the next justices of peace, to find caution for their good behaviour, or otherwise to be committed to prison. The constables are also authorised to stop and arrest all vagabonds, sturdy beggars, and Egyptians, and carry them before some justice of the peace, who may either commit them to prison, or punish them otherwise, according to the Statutes of Parliament.

4. The constables are likewise, each within his parish, to arrest all idle persons whom they know to have no means of livelihood, and who yet will not apply themselves to any labour, trade, or occupation, and to carry them before some justice of the peace, who, after examination, is either to commit them to prison or make them find caution for appearing at the next quarter session.

5. Constables, in their respective parishes, are to apprehend every person or persons that are guilty and culpable of slaughter, murder, theft, or any other capital crime whatsoever, and are to require their neighbours to assist them, in order to convey with safety persons of this description to the next justice of peace, who is either to commit them or make them find caution, according to the instructions given to justices of peace in such cases. And whoever refuses or delays to assist the constables in the execution of their office are to be imprisoned, or otherwise punished by the justices at their sessions.

6. All persons not in His Majesty's service who are found wearing hagbuts, guns or pistols, in any sort, are to be arrested by the constables, and

carried by them before some justice of peace, who is to make them find surety for their appearance at the next quarter session, or otherwise to commit them prisoners till they give security: unless such persons be licensed by the council or by some empowered by them to grant such licences.

7. If there be any appearance of any fray or stir between parties, the constable is to require the assistance of his neighbours for preventing such fray or stir: and if any injury be done to the constable while thus employed, or to any of his assistants, by those who caused the fray, such persons are to be punished by the justices at the next session. And if any party of the rank of yeoman complain to a constable that he is threatened by another, the constable is, in that case, to apprehend the threatener, and carry him, together with the party complaining, before the next justice of peace, and if he refuses to be carried before the justice, he is then to be carried to prison. As to those of higher rank, the justice, by the Act 1617, upon being informed of it himself, shall then inform the council, and, in the meantime, bind the party to the peace.

8. When any person or persons have made a fray, and then betake themselves to some house for protection, the constables may follow them to the house, and require the master and keeper of the house to open the doors, and if they refuse, the constable is to take notice of such master or keeper and require witnesses thereupon. And though the delinquent should even escape beyond the bounds of the constable's charge, yet the constable may pursue and apprehend him, and crave the concurrence of the county to that effect.

9. The constables in every parish must execute all such precepts and warrants as they shall receive from time to time from the justices of the peace.

10. The constables are to be defrayed for their trouble and pains in the following manner. The justices are to give up particular notes in writing to the auditors of His Majesty's Exchequer, of the fines inbrought to them, out of which fines a sum is to be allotted as a satisfaction to the constables for their labour. And if these fines are found not to be sufficient, the Lords of His Majesty's Exchequer may ordain such further reward as to them shall appear just. The oath taken by constables, upon entering to their office, is as follows: "I do swear that I shall faithfully and truly discharge the office of constabulary within the parish of———, ending the time appointed to me, and shall not, for favour, or respect, or fear of any man, forbear to do what becometh me in the said office. And, above all things, I shall regard the keeping and preserving of the King's Majesty's peace, and shall at every quarter session and meeting of justices give true and due information of any breach which hath been made of His Majesty's peace within the bounds of my commandment, and shall no way hide, cover, nor conceal the same, nor any of the proofs and evidences which I can give for the clearing and proving thereof. So help me God."

According to the foregoing provisions of the Statute, constables acted either in virtue of their own powers as conservators of the peace, or as officers of the justices. Constables are not mentioned in the Act of Union, 6 Anne, c. 6, whereby the powers in relation to the public peace, previously vested in English justices, were extended to those of Scotland. But there is no reason to doubt that it was intended to enlarge their powers, as well as those of justices. 11 Geo. IV. c. 26, entituled "An Act for more effectual disarming the Highlands in that part of Great Britain called Scotland, and for the better securing the Peace and Quiet of that Part of the Kingdom," authorised the freeholders of every shire, county,

or district of Scotland to assess the several shires or stewartries for raising a sufficient fund to defray the charges of apprehending, subsisting, and prosecuting criminals," the assessment being called Rogue Money. 2 & 3 Vict. c. 65, authorised commissioners of supply to assess for maintaining an efficient constabulary force in a county. 1 Geo. IV. c. 37, 1820, gave power to justices of the peace to appoint special constables: but this Statute was repealed by 24 & 25 Vict. c. 101. The Statutes relating to the appointment of constables apparently contemplated the appointment of constables every six months, but this, which would have been highly inexpedient in practice, was not observed. Constables once appointed were continued until they were removed or their resignations accepted by the quarter sessions.

General Powers of a Constable.—Arresting without a Warrant.—A constable may arrest in cases of breaches of the peace or other violent threats of immediate mischief, and in cases of felony which he has seen committed, or has information from others who are sure of the fact, and where the circumstances are such that the criminal would escape if any delay took place (Hume, ii. 76; *Meldrum*, 1746, Kilk. Rep. 304: Alison, ii. 117). This rule is part of our common law, but it is supported by the instructions to constables in the Act 1617, c. 8. These powers of arrest are not abrogated by special statutory rules, empowering justices to grant warrant to summon offenders on information of a breach of Statute (*M'Vie*, 1855, 2 Irv. 429: 28 S. J. 416). A clause in a Police Act as to powers of arresting does not give a higher power of arresting without a warrant than the common law (*Pyne*, 1868, 7 M. 89). It is a question of circumstances whether a constable can arrest without a warrant (*Pringle*, 1867, 5 M. (H. L.) 55; *Wallace*, 1885, 12 R. 710: *Melvin*, 1847, 9 D. 1129); but, as Lord Neaves says in *Brown*, 1874, 1 R. 781, "It is not every error in judgment, particularly in regard to a precautionary act, that will make a police officer liable in damages." A constable may arrest anyone who stands in his way to hinder him from performing his duty (*Edwards*, 1 C. & P. 40). In certain cases a constable may arrest a suspected person on the verbal warrant of a magistrate (*Beaton*, 1887, 14 R. 1057). While a riot is proceeding a constable may arrest anyone engaged in it, but after it is over cannot do so without a warrant, unless someone has been dangerously wounded in the fray (Ersk. v. 4. 16: *Cook*, 1834, 6 C. & P. 741; *R.* v. *Light*, 27 L. J. M. C. 1: *Baynes*, 2 Q. B. 375). A constable when making an arrest may command the assistance of the neighbourhood (Hume ii. 76; Alison, ii. 118), and he may call on private persons to assist in quelling a fray or preventing its outbreak (Alison, ii. 77). A constable's duty is to apprehend, and it does not extend to committing to prison; therefore, when arrested, the supposed delinquent must be brought before the nearest magistrate in order that he may be examined (Alison, ii. 118; Hume, ii. 76); but the delinquent may be detained over night if, owing to lateness of the hour or distance, he cannot be brought before a magistrate on that day (*MacDonald*, 1851, 24 S. J. 65). A constable in pursuit of a criminal charged with murder, robbery, housebreaking, rape, fire-raising, treason, or the like, which by their violence threaten the peace of society, may break open doors without any warrant where the fugitive has taken refuge, or where he has received reasonable information that he has taken refuge. But this does not hold with persons charged with a breach of the peace, unless the constable actually hears a tumult or affray going on, when it becomes his duty to break in, to prevent a breach of the peace. It must be noted, that to justify the constable in making a forcible entry into any house (and this is true

though he be the bearer of a written warrant), he must first demand and be refused admission, and must notify who he is, and the purpose of his coming (Hume, ii. 76; Alison, ii. 118). Power to stop, search, and detain vehicles or persons suspected of carrying stolen goods can only, as a rule, be exercised in the street or other open place (*Hadley*, L. R. 1 Q. B. 444).

Arresting with a Warrant.—A constable arresting a person upon a warrant must acquaint the party with the substance of the warrant. He is bound to show his warrant if demanded, unless in such circumstances as appear to endanger the document, such as snatching it from him (Hume, ii. 78; Alison, ii. 124). With regard to breaking open doors, it is the rule that violence is not to be resorted to by the bearer of a warrant, unless he has first notified his errand to those within the house and been refused admittance. If this be done, he may force open doors in order to apprehend the suspected person, and that equally whether the suspected person is in his own house or in that of another, and whether he is known for certain to be the guilty person or only suspected as such (Hume, ii. 80; Alison, ii. 124). The word of a person within the house, to the effect that the criminal is not there, need not be taken; a constable may break open the door and search, breaking inner doors and lids of places where the suspected person is supposed to be lurking, for "the principle of the law is that every person is bound to throw open his doors, and make patent all the secret parts of his dwelling or premises, in order to facilitate so important an object as the arrest of a criminal; and therefore any resistance to an officer, who legally and temperately discharges that duty, implicates the resisters in direct disobedience to the law" (Alison, ii. 125; Hume, ii. 80). If a constable has notified his errand and been refused admittance to a house, he is not answerable for the consequences of breaking in, although the suspected person truly neither is, nor ever has been, within the premises, or though, if there, he is entirely innocent of the charge, or the felony or crime in question never has been committed (Alison, ii. 125; Hume, ii. 80). A constable cannot arrest beyond the bounds for which the warrant runs. If a warrant has to be executed beyond the bounds, it must be endorsed by a magistrate of the bounds to which the offender has fled. A warrant of apprehension from the Sheriff may be executed in any other county, but it must be executed by an officer of the Court from which it is issued, or by a messenger-at-arms (1 & 2 Vict. c. 119, s. 25). Where the offender has left Scotland, the warrant must be endorsed by a magistrate of the place where it is proposed to apprehend (11 & 12 Vict. c. 42, s. 15, and 12 & 13 Vict. c. 69, s. 15). See WARRANT and EXTRADITION. Where a prisoner is apprehended in England, the Acts 11 & 12 Vict. c. 42, s. 15, and 12 & 13 Vict. c. 69, s. 15, provide that the constable arresting should convey the prisoner before a magistrate adjacent to England. But this is not now done, "because that practice would be of no benefit to the accused in these days of rapid transit" (*Sinclair*, 17 R. (J. C.) 38). Having apprehended a prisoner, it is the duty of the constable to take him with all convenient speed before a magistrate, to be by him dealt with according to law. The prisoner may be detained for the night, if, owing to the distance from the magistrate, or the lateness of the hour, he cannot be brought before the magistrate on the day of his apprehension (Hume, ii. 80; Alison, ii. 129; *Crawford*, 1856, 2 Irv. 511, 29 S. J. 12). As to the provisions of the Burgh Police (Scotland) Act, 1892, in regard to this matter, see secs. 467, 476. See CONSTABLE, BURGH.

Search Warrant.—A constable, in executing a search warrant, is bound to observe the same precautions as in executing a warrant for the arrest

of an individual (Alison, ii. 147; *Peggie*, 7 M. 89). A search warrant should be executed in the daytime if possible; but it is not illegal and irregular to execute it at night, if this is the only season when it will meet with success (Alison, ii. 147; 2 Hales, 154).

Service of Summonses, Complaints, etc.—44 & 45 Vict. c. 33, s. 12, provides that "all summonses, complaints, warrants, orders or other process in prosecutions under the Summary Jurisdiction Acts, at the instance of procurators-fiscal, parochial boards, or school boards, may be served and executed by police constables within the county, burgh, or police district in which the persons upon whom the same are to be served reside or may be found."

Privileges.—Constables in the execution of their duty are entitled to the like privileges as justices themselves. The Act 24 Geo. II. c. 44, for "rendering justices of the peace more safe in the execution of their office, and for indemnifying constables and others acting in obedience to their warrants," has been held not to extend to Scotland; but the privilege has been generally held as secured to them by common law (Boyd, *Justice of Peace*, 791). 43 Geo. III. c. 141, expressly extends the privilege to constables, and the Statute has been held to apply to Scotland (*Gibsons*, 18 June 1817, F. C.).

County Constables.—By 2 & 3 Vict. c. 65, counties were enabled to maintain paid constabulary forces. But the Police (Scotland) Act, 1857 (20 & 21 Vict. c. 72), is now the leading Statute, modified by the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50): and by 21 & 22 Vict. c. 65; 30 & 32 Vict. c. 72; and 50 & 51 Vict. c. 9.

The Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), places the police administration of a county in the hands of the county council. The Standing Joint-Committee, appointed in terms of the Local Government Act, s. 18 (1), is now the Police Committee under the Police Act, 1857, and has all the powers of such committee, and is subject to all the provisions of that Act, except where they are expressly modified by the Local Government Act, s. 18 (5). See STANDING JOINT-COMMITTEE. Under the Local Government Act the area of county police administration is the county as defined by the Act (excluding police burghs which contain not less than 7000 inhabitants, and which maintain a separate police force), along with every burgh, royal or parliamentary, which contains less than 7000 inhabitants, or which does not maintain a separate police force. The county council may divide the county into police districts (Local Government Act, 1889, s. 97: and 20 & 21 Vict. c. 72, ss. 58–60): but the practical administration of the Police Act in a county is in the hands of the Standing Joint-Committee. This committee appoints the chief constable and fixes the number of constables, which may be increased or diminished with the consent of the Secretary for Scotland (Police Act, 1857, ss. 1–5). Rules for the government, pay, clothing, accoutrements, and necessaries of constables are, from time to time, to be made by the Secretary for Scotland, but not such as will increase or diminish the number of constables (Police Act, 1857, s. 3). Subject to the approval of the Standing Joint-Committee, the chief constable appoints the constables for the county, and a superintendent to be at the head of the constables in each division of the county. He may dismiss all or any of them, and he has the general disposition and government of all the constables so appointed, subject to such lawful orders as he may receive from the Sheriff or the justices of the peace in general or quarter sessions assembled, and to the rules established by the Secretary for Scotland for the government of the force, "provided always

that in the case of any conflicting orders being issued by the Sheriff and justices of the peace assembled as aforesaid, the orders of the Sheriff shall be followed by the chief constable," until the decision of the Secretary for Scotland has been pronounced (Police Act, 1857, s. 7).

Constables on appointment take the following oath before the Sheriff or any justice of the peace for the county: "I hereby swear that I will faithfully discharge the duties of the office of constable" (Police Act, 1857, s. 11).

Powers of County Constables.—County constables have all the powers and privileges which any constable or police officer duly appointed has by virtue of the common law, or of any Statute, made or to be made, throughout the county for which they are so appointed, "and also in all detached parts of other counties locally situated within such county, and also in any harbour, bay, loch, or anchorage within or adjoining such county, and in every burgh situated wholly or in part in such county, and also in any county adjoining to the county for which they are appointed; and it shall be lawful to any constable appointed for any one of the border counties of England or Scotland respectively—(that is to say), the counties of Northumberland, Cumberland, Berwick, Roxburgh, or Dumfries—to execute within any of such counties the lawful warrant of any Sheriff, justices of the peace, or other magistrate, for the apprehension of any person accused or convicted of a criminal offence committed, or for the recovering of any goods alleged to have been stolen, within the county of which such constable had been duly appointed one of the constables, in like manner as such warrant might be executed by such constable within the last-described county" (Police Act, 1857, s. 11). Constables are required, authorised, and empowered to guard, patrol, and watch within the county, according to such regulations as may from time to time be prescribed by competent authority, and "to bring before the Sheriff or justices of the peace, one or more, all persons who may be found within the county actually engaged in or committing any criminal, riotous, or disorderly conduct or act, including offences committed on any turnpike or statute labour road, or otherwise, in contravention of the provisions of the General or any other Local Turnpike Act, or of the General or any Local Statute Labour Act, or accused or suspected of having committed crimes, delinquencies, or offences, of whatsoever description, and at what place soever the same may have been, or are suspected to have been committed, whether the same be of such a kind as can competently be tried before such Sheriff or justices, or be of a nature requiring to be remitted for trial before a higher tribunal, or which, from having been committed beyond the bounds of the county, fall to be tried in another jurisdiction" (s. 12). Upon the apprehension of any person charged with any offence such as may be competently tried by any justice or justices of the peace, the chief constable, or any superintendent of police, or any constable duly authorised by the Police Committee, and in charge for the time being of any station-house, strong-room, or lock-up, may accept of bail or deposit that such person shall appear for examination and trial before the Sheriff or Justice of the Peace Court at some time and place to be specified, and they may liberate the person so apprehended upon bail being found to an amount not exceeding £10, or upon the deposit of any money or article of value to the amount of the bail fixed (Police Act, 1857, s. 13). Constables may execute warrants and deliverances issued in any criminal proceeding in a county (s. 14; 44 & 45 Vict. c. 33, s. 12). In addition to their ordinary duties, constables must perform such duties connected with the police in their respective counties as the Sheriff or

justices of the peace of the county may from time to time direct and require (s. 15). Constables must not take fees for their own use for the performance of their duties (s. 16). A penalty not exceeding £10 is imposed on constables for neglect or violation of duty, and is recoverable before the Sheriff or two justices (s. 20). Constables cannot resign without leave, or notice of one month in writing, under a penalty (s. 21). Constables who are dismissed must deliver up their accoutrements, etc. (s. 22), and there is a penalty of £10 upon those who are found in the unlawful possession of a constable's accoutrements (ss. 22, 24). Any half-pay or pension to which a constable is entitled for time spent in a former service may be taken by him (s. 19). Formerly constables were disqualified from voting at any parliamentary election in their county, or any burgh within it, or in any adjoining county, or any burgh within the same. Now, by the Police Disabilities Removal Act, 1887 (50 & 51 Vict. c. 9), that provision is repealed, and constables are entitled to vote. Provision is made for a constable on duty on the day of election at a distance from his polling booth recording his vote; and provision is made for registration in the case of temporary absence, during the qualifying period, of a police officer on duty (Police Disabilities Removal Act, 1887, ss. 2 and 3). A constable is prohibited from endeavouring "by word, message, writing, or in any other manner . . . to induce any elector to give, or abstain from giving, his vote" in a parliamentary election, under a penalty of £20 (s. 17). Constables are exempted from serving on juries and in the militia (s. 18).

Pensions and Gratuities.—Under the Police Act, 1857, s. 52, power is given to grant out of the police assessment gratuities to incapacitated constables over sixty years of age. Under 53 & 54 Vict. c. 67, a pension fund was established in connection with every police force, and the county council, as the police authority, have the administration of this fund. The persons entitled to pensions, or who may obtain gratuities, are any members of the police force, including the chief constable, who fall under the following classes:—

1. Constables not less than fifty-five years of age, and after twenty-five years' service, are entitled to a pension. If incapacitated before that age, a gratuity may be granted.

2. Constables incapacitated by injury caused in the performance of their duty are entitled to retire upon a pension. If death occurs within twelve months of the pension being granted, it may be given to a widow.

3. The widow of a constable dying from injury received in pursuance of his duty receives a pension, and the children receive allowances.

4. Where a constable dies from any cause, a gratuity may be granted to the widow and children.

5. If a constable to whom a pension has been granted, dies within twelve months, a gratuity may be granted to his widow and children.

Special Constables.—The Police Act, 1857, ss. 7 and 8, gives power to the chief constable of a county to appoint special constables for protecting private property, at the expense of persons applying for them.

Constable, Burgh.—The police within burghs in Scotland is regulated by the Burgh Police (Scotland) Act, 1892, 55 & 56 Vict. c. 55. Police forces must be maintained by the commissioners of burghs in three cases: (1) burghs having, at the census of 1891, a population of 7000 or more, and maintaining at the date of the passing of the Act of 1892 a

separate police force; (2) burghs which, at the census of 1891, had a population of not less than 20,000: and (3) burghs which, at any time hereafter, are found by the Sheriff to contain a population of 20,000. Such burghs may appoint a chief constable. Where a burgh or police burgh contains a population of less than 7000, then the county council has the duty of maintaining a police force in the burgh (L. G. Act, 1889, s. 13).

The chief constable of a burgh appoints the constables, and he may suspend and remove them at pleasure: but the commissioners fix the number of constables required for the burgh, and their pay (1892 Act, ss. 78–89). A constable on his appointment has to make the declaration: "I hereby do solemnly, sincerely, and truly declare and affirm that I will faithfully discharge the duties of the office of constable" (s. 92). A constable cannot resign without giving one month's notice; and if dismissed, he must deliver up his accoutrements (ss. 89–92). Every constable who is guilty of any neglect or violation of his duty as a constable, and is convicted thereof before a magistrate, is liable to a penalty not exceeding £10. Burgh constables have all the powers and privileges which any constable or police officer duly appointed has, by virtue of the common law or by Statute, in the burgh for which they are so appointed, and in any county in which such burgh is wholly or partly situated, and in any burgh contiguous or adjacent to such burgh, and in any harbour, bay, loch, or anchorage within or adjoining such burgh or county (s. 80). It is the duty of burgh constables "to guard, patrol, and watch within the burgh, according to the regulations to be prescribed by the chief constable, under the control of the commissioners; and it shall be lawful for the said chief constable, or any constable of police, without any other warrant than this Act, to apprehend and to bring before the magistrates of police, all persons actually committing any criminal, riotous, or disorderly act, or accused or suspected of having committed crimes, delinquencies, or offences of whatsoever description, and at what place and period soever the same may have been, or are suspected to have been committed, whether the same be of such a kind as can be competently tried before the magistrates of police, or be of a nature requiring to be remitted for trial before another tribunal, or which, from having been committed beyond the bounds of the burgh, fall to be tried in another jurisdiction; and the chief constable and constables shall obey the orders of the magistrates, and at all times afford their aid and assistance to the magistrates, and to all other judges and magistrates having jurisdiction within the burgh, in all matters relating to the preservation of peace and good order, the suppression of nuisances, and the removal of obstructions within the burgh, and shall enforce the observance of all bye-laws, orders, rules and regulations made, or to be made, by the commissioners, and they shall give attendance at the police courts of the burgh, and, when required, at all meetings of the commissioners or their committees, and furnish them with all explanations relating to matters falling within their several departments of duty" (s. 86). This clause does not give any higher right of arrest without a warrant than the common law confers on constables; "it merely fortifies a constable in the discharge of his duty, and defines it" (*Peggie* v. *Clark*, 7 M. 89). The Act of 1892, s. 462, makes a provision that "any person found committing any offence punishable either by indictment or criminal libel, or upon summary conviction under this Act, or any other Act under which the magistrate has jurisdiction, may, without a warrant, be taken into custody by any police constable." Constables may execute warrants in the burgh; and summonses, complaints, and orders; or other process, under the Summary Jurisdiction Acts, in the burgh (1892 Act, s. 84,

44 & 45 Vict. c. 33, s. 12). A burgh constable has power, by virtue of his office, to enter at any time any premises or other place of the following description:—1. Any place to which the public are admitted by payment or otherwise, used for the purpose of a theatre, public show, or other place of public amusement or entertainment. 2. Any music, singing, or dancing saloon, or any shooting gallery, or bowling or nine-pin alley, or any place for playing skittles, or any eating house, coffee house, or other such place. 3. Any victualling house, public house, house or building in which wine, spirits, beer, cider, or other excisable or fermented or distilled liquors are sold, or suspected to be sold, whether licensed or not. 4. Any house, or building, or brothel for the reception of prostitutes, or usually frequented by thieves or loose and disorderly persons. 5. Any building or part of a building which is kept or used for a purpose in respect of which a licence is required by the provisions of this Act. 6. Any ship or other vessel not being employed in H.M. Service. Further, burgh constables may, with magistrate's warrant, enter unlicensed theatres and remove the occupants, and they may enter suspected brothels and take the occupants into custody (ss. 401, 402, 403). Burgh constables may seize and impound stray cattle, may take possession of dogs not under the control of any person, and they may require street musicians to remove from the neighbourhood of the houses of persons who complain (ss. 386, 390, 391). Burgh constables may stop and convey to the police office any cart or carriage removing furniture, or any person carrying furniture, between the hours of eight in the evening and six in the morning, except at the usual terms of removing (s. 388). Penalties are imposed upon persons who resist, obstruct, or molest a constable in the execution of his duty, or who aid or incite any persons so to do (s. 87).

Additional Constables.—Additional constables may be appointed temporarily for burghs, and constables may be detached to other places (ss. 82, 83).

Special Constables.—For the purpose of aiding the police constables on occasions of emergency, and suppressing or preventing tumult or riot, the magistrates may, from time to time, appoint any of the owners or occupiers of lands or premises, or other person residing within the burgh, between the ages of twenty and twenty-five, to act as special constables for a period not exceeding six months, and may recall such appointment at pleasure; and the special constables so appointed have the same powers and privileges as constables appointed under the Act. Special constables on duty are under the direction of the chief constable, but the magistrates may make such regulations for their organisation and training as they think proper (s. 98).

Pensions and Gratuities.—Magistrates have the powers, as to pensions and gratuities, given under the Police Act, 1890, 53 & 54 Vict. c. 67. See Constable, County. Further, burgh commissioners have power to reward meritorious services, and also to make provision for any chief constable or other servant of the police establishment to whom the Police (Scotland) Act, 1890, does not apply, and who may at any time be disabled in, or, after long service, be unfitted for the execution of his duty, or for the widow or family of a constable who may lose his life in the execution of his duty.

Constable of Scotland (The High).—The office of High Constable is an ancient office of State and of the Royal Household. The

High Constable was in theory the commander of the king's army. He had a jurisdiction extending to all slaughters and riots committed within four miles of the king's person, or of the Parliament or Privy Council, or any general convention of the Estates. Under him were inferior constables, such as the Constable of Haddington, of Dundee, etc., and the Constables of royal castles. The office of High Constable is hereditary in the House of Hay, Earl of Errol, to whose ancestor it was granted by Royal Charter in 1315. The office was reserved in the Heritable Jurisdictions Act of 1747, 20 Geo. II. c. 43.—[Ersk. i. 3, 37; Dalrymple, *Collections*, 66; Innes, *Legal Antiq.* 75.]

Constitution.—All determinations made by the Roman emperors in the exercise of their legislative, administrative, and judicial prerogatives were designated by the general name *Constitutio*. They had statutory force "because the people delegated to the emperor all its power and authority" (*Inst.* i. 2. 6). The following varieties may be distinguished, although they are not always kept strictly apart:—

1. *Orationes*, proposals of legislation laid before the Senate or the *Comitia* in the shape of a speech or message, in order to receive its assent, and thereby pass into law. The emperor's *oratio* was often cited in preference to the *Senatus consultum* or *lex*, which was nominally requisite to give it the force of law.

2. *Edicta*, legal principles enunciated by the emperor in his capacity as a magistrate of the Roman people. An edict was practically an order to all officials to give effect to the new rule it laid down. Edicts, unless expressly repealed, appear to have been binding on the successors of their author.

3. *Mandata* were instructions, partly administrative, partly legal, communicated to all imperial officers and provincial governors for their guidance in the discharge of their duties.

4. *Decreta* were decisions given by the emperor in causes which he tried, either as a judge of first instance or on appeal.

5. *Rescripta* were written opinions of the emperor upon cases referred to him, as the final interpreter of the law, by petition from a magistrate or a party to a litigation. In his answer the emperor was usually content to settle the legal point at issue, leaving it to the magistrate or judge to apply the principle after investigating the facts of the case. If the rescript was written on the petition itself below the question submitted, it was called *subscriptio*; if it was written on a paper apart, it was called *epistula*.

It has been much discussed whether these decisions and opinions were of any force beyond the particular cases out of which they arose. The only general rule seems to be that it depended on the intention of the emperor whether a decision was to be treated as a precedent of general applicability or not; and, in case of doubt, the intention of the author would be matter for argument (see Savigny, *Syst.* i. 125–41).

Constitution, Decree of.—Every action for payment of debt is, in a sense, an action of constitution, but the term is specially applied to an action for payment of debt brought against the representatives of a deceased debtor. In such a case the pursuer seeks to have it found and declared that the sum sued for, with expenses, is a just, true, and lawful debt, resting-owing to the deceased by the pursuer. A decree of constitution is necessary wherever the debt is not liquid, where there is no document of debt, or where the document is ambiguous. A simple action of constitution is not commonly made use of (see, however, *Juridical Styles*, vol. iii.

p. 10). It is usually to be found in conjunction with some other form of action, as, for example, an action of payment and constitution. The conclusion for expenses should be so worded as to ask for them only in the event of the claim being opposed (*Earl of Rosslyn*, 1872, 9 S. L. R. 291). When the action is not opposed, the pursuer must pay his own expenses; if it is opposed, expenses follow the event in the usual way (*Davidson*, 1867, 6 M. 151; *Smith*, 1860, 22 D. 1495; *Jackson's Trs.*, 1832, 10 S. 597). Where the representatives of the deceased debtor have taken no steps to have themselves confirmed, or where they have renounced, the pursuer may restrict his demand to a claim for a decree *cognitionis causa tantum*, which gives him the right to attach the goods of the deceased, but imposes no obligation upon the defenders (*Forrest*, 1863, 1 M. 806). (For Decree of Constitution in Adjudications, see *Encyclopædia*, vol. i. p. 96; *Juridical Styles*, 3rd ed., vol. iii. p. 127).—[Mackay, *Manual*, p. 518: Dove Wilson, *Sheriff Court Practice*, 4th ed., p. 393: Monteith Smith on *Expenses*, p. 218.]

Constitutional Law, or "Public Law," as it is usually called by continental writers, is the law which determines the form, regulates the mechanism, and defines the rights and duties of the State. In other words, its chief topics are the liberty of the subject; the maintenance of law and order; the sovereignty, its seat, and its exercise. It regulates the relations between different departments of the State, and those between the State, as such, and the individual members of the community. As here used, the word "law" embraces both the positive law, enacted by the Legislature or established by custom, and those tacit rules, conventions, and understandings which, though unknown to law in the narrower sense, are most potent and essential factors in the working of constitutional government. Constitutional law, it should also be noted, can have no existence except in a constitutional State—that is, a society which has framed for itself a constitution, or fixed code of laws and regulations, both for the protection of its members and for its own maintenance. Whether written or unwritten, such code expresses the organised collective will of society, that is, its political will, and cannot be altered except by a new expression of that will. But no such code can exist in a State governed by the individual will, or the irresponsible caprice of one person, or of a few. Where the organised and known collective will is the true sovereign, the State is usually termed self-governing or constitutional; where an unknown and fluctuating individual will is supreme, the State is an autocracy or despotism. The constitutional law of Great Britain, on which the constitutions of most other modern countries have been based, is itself mainly unwritten. It consists partly in such venerable Statutes as Magna Carta (1215), the Petition of Right (1628), and the Bill of Rights (1689), but chiefly in principles handed down from Anglo-Saxon times (such as representation, trial *per pais*, and limitation of the royal authority), and, above all, in the crowning principle of equality before the law. With us, as a rule, the one law of the land is meted out to all alike: in other countries there frequently exist military, administrative, ecclesiastical, and other codes, which, conflicting with the common law, and unduly lenient, or unduly stringent, are apt to work injustice, cause dissatisfaction, and endanger the State. To these definitions may be added a few illustrations. *Hampden's*, or the *Ship-money* case (1637), the *Seven Bishops'* case (1688), and *Wilkes* v. *Wood* (1763), involved questions of constitutional law in the narrower or purely legal sense. The nature of our limited monarchy, the functions of the legislative and exe-

cutive powers, and the duties and responsibilities of Ministers, are all defined by constitutional law in the wider historical and political sense. To this wider sphere belong also such rules as that which imposes on the party in office both legislative and executive responsibility, and that which gives the Commons the exclusive power of making and unmaking the "Governments."

[Anson, *Law and Custom of the Constitution*; Dicey, *Law of the Constitution*; Works of Stubbs, Hallam, May, and Bagehot on the English Constitution; Broom, *Constitutional Law*, etc.] See also POLITICAL SCIENCE.

Consuetudinary Law. — Consuetudinary, or customary, law is that which is constituted by constant and immemorial custom or usage. It is unwritten, and is distinguished by this characteristic from the law enacted by legislation, which is written law (*jus scriptum*). Of the reason of its authority, Erskine says (*Inst.* i. 1. 43, also s. 30), in opposition to Stair (*Inst.* i. 1. 16): "The authority, therefore, of customary law is not grounded on any presumption that what has been long observed must be just, for that presumption is alike applicable to written and unwritten law; but both one and the other derive their coercive force from this, that they are the ordinance, either express or implied, of the supreme power." (So also Lorimer's *Inst.* p. 539.) This law is a principal foundation of the common law of the land. See COMMON LAW.

Consul.—In addition to the diplomatic agents by whom their political intercourse is conducted (see AMBASSADOR), civilised States, in order mainly to promote and protect the commercial interests of their subjects abroad, have long maintained in the territories one of another certain quasi-diplomatic agents, named generically consuls.

The consular service includes the following ranks: (1) consuls-general, (2) consuls, (3) vice-consuls, (4) consular agents; but in some countries, Great Britain for example, and the United States, the service is still further graduated. Consuls-general and consuls are appointed by commissions from their Government, and before entering upon their duties receive from the Government of the country where they are to reside an instrument called an *exequatur*, which is a formal confirmation of their commission. Vice-consuls and consular agents are sometimes appointed by Government commission, sometimes are nominated by the consuls-general or consul, to whom they are subordinate; in the latter case, their appointment is often confirmed in a less formal manner than by the issue of an *exequatur*.

History.—The origin of the Foreign Consulate must, it appears, be sought in the Frankish settlements which were established in Syria and Palestine in the ninth century A.D.; albeit classical antiquity can show an analogous institution in the office of the Greek Proxenus (see Smith's *Dictionary of Classical Antiquities, sub. voc.*, and Arnold's *Thucydides*, Bk. ii. c. 29, note). On the shores of the Mediterranean in the eleventh century, and later on the east and north coasts of Europe, the consulate developed with the growth of commerce; so much so, that, at the close of the Middle Ages, consuls exercised extensive powers of jurisdiction, and enjoyed important immunities and privileges. With the establishment, however, of permanent embassies in the seventeenth century, the prestige of the consul rapidly dwindled away.

In describing the consul's position at the present day, it is necessary to

consider separately: (I.) The consulate in Christian countries; (II.) the status of Christian consuls in non-Christian countries.

(1) *Duties.*—The jurisdiction which the consul is now permitted to exercise in the country where he resides is very limited. He may arbitrate in commercial questions voluntarily submitted to him by his fellow-countrymen, or in disputes which have taken place on board the ships of his nation; and sometimes, under convention, he is given a disciplinary jurisdiction over the internal order of merchant vessels of his State, the local authorities retaining a right of interference only when the peace of the port is disturbed, or when persons other than the officers and crew are involved in any breach of order that may have occurred on board ship. Besides jurisdiction, the principal duties permitted him, by custom or treaty, are as follows: To receive the protests and reports of masters of vessels; to administer oaths; to legalise by his seal judicial and mercantile instruments for use at home; to authenticate the births and deaths of his fellow-countrymen, and even to solemnise their marriages (cf., *e.g.*, 12 & 13 Vict. c. 68; 31 & 32 Vict. c. 61; 53 & 54 Vict. c. 47); to administer their property in the event of their dying within his jurisdiction; to send home shipwrecked sailors and destitute persons; to collect commercial and political information for his Government, and embody it in a periodical report; lastly, to watch over the commercial interests of his country, and to see that the laws are properly administered in reference to its subjects, and that commercial treaties are duly implemented. The last instance apart, it is clear, from the nature of his duties, that the consul is not an international agent; and even in the case of inequitable treatment of his fellow-countrymen or infraction of treaties, the consul, unless expressly permitted by convention, may not directly complain to the local Government, but must make representations through the diplomatic agent of his country.

Privileges.—Inasmuch as they are not representatives of their States, or intrusted with the performance of international duties, consuls do not enjoy the same immunities as diplomatic agents (Barbut, referred to in *Bath*, 3 Burr. 1481; *Viveash* v. *Becker*, 3 M. & S. 284; see AMBASSADOR), but are entitled, under international law, to the following privileges: The consul's person is so far inviolable that he may not be arrested for political reasons, and any outrage offered him is a grave offence, for which his State may demand reparation. He is exempted from personal taxes, unless, perhaps, he engages in trade or owns real estate in the country of residence; he is relieved from duties incompatible with the discharge of his consular functions, such as service on juries, or in the militia or constabulary; and even if arrested on a criminal charge, he should, if possible, be kept under surveillance in his own house. He is not liable to have soldiers billeted upon him. The consular archives and papers may not be seized, and the arms of his country may be displayed upon his house. When consuls are credited as CHARGÉS D'AFFAIRES (see *sub voce*), their consular character is subordinate to their superior diplomatic character, and they are invested with diplomatic privileges.

If a State receives one of its own citizens as consul for a foreign State, it extends to him the same privileges as would be due to him were he a subject of that foreign State.

Mere residence as a consular officer in a foreign country gives rise to no inference of a domicile in that country (*Sharp*, L. R. 1 P. D. 611; *Niboyet* v. *Niboyet*, L. R. 4 P. D. 1). If, however, the consul carries on trade in the country of residence, he may acquire a domicile there, notwithstanding the fact of his acting as consul for some other country. And,

in any case, a person carrying on trade in a belligerent country in time of war is not exempted from liability in respect of his property by reason of his acting as consul for a neutral State (*The Indian Chief*, 3 C. Rob. 26; *Sorensen* v. *The Queen*, 11 Moo. P. C. C. 141).

(2) In non-Christian countries, such as Turkey, the Barbary States, China, Japan, Siam, and other parts of the East, consuls are invested with a large measure of civil and criminal jurisdiction, and enjoy extensive immunities. By conventions concluded between these States and the various Christian Powers, it is expressly provided that the subjects of the latter resident in the dominions of the former shall not be amenable to the local laws and jurisdiction, but shall remain under the laws of their respective States, and authority over them is conceded to their respective consuls (*e.g.* see Anglo-Chinese Treaties, 1842, 1843, 1858, and Anglo-Japanese Treaty, 1858; but cf. Anglo-Japanese Treaty, 1894). In terms of these concessions, the various Christian Powers have by their municipal laws established each its own Consular Courts. The British Consular Courts derive their authority from the Foreign Jurisdiction Acts, 1843 (6 & 7 Vict. c. 94), 1878 (41 & 42 Vict. c. 67), 1890 (53 & 54 Vict. c. 37), and Orders in Council passed in pursuance thereof.

Each Consular Court has power to adjudicate in cases of crimes committed by subjects of that nationality, and in civil suits arising between them, or to which such a subject is defendant. In criminal cases, the highest sentences, as a rule, require to be ratified, and in important civil cases an appeal lies to the superior tribunals at home.

In virtue of the conventions referred to, consuls enjoy many of the immunities of diplomatic agents. In particular, it appears that their consulates may, on occasions of popular disturbance, be used as places of refuge by their compatriots, or those whose lives are in danger.

[Miltitz, *Manuel des Consuls*; De Martens, *Le Guide Diplomatique*; Tuson, *The British Consul's Guide*; De Garden, *Traité de Diplomatie*, i. 315; Laurence, *Commentaire*, i. 1–103; Phillimore, *International Law*, ii. 265; Kent, *International Law* (Abdy's edition), 125; Hall, *International Law*, 314.

Consultation of Judges.—Provision is made by the Court of Session Act, 1868, for the rehearing of cases in the Inner House. In the event of the judges of either Division being equally divided in opinion on a question of fact arising upon a proof, or upon a cause which, in their opinion, does not involve any legal principle of importance, such Division may appoint the cause to be reheard before the judges of the Division, along with such other judge or judges as may be necessary to make up the number of five (31 & 32 Vict. c. 100, s. 59). Further, in cases of equal division of opinion not falling under the preceding section, and in cases of difficulty or importance, it is competent for either Division to direct that the papers in the cause be laid before three other judges to be named in the interlocutor, with a view to their opinions being communicated in writing, or to direct that the cause be argued before themselves with the assistance of these three judges. If the case was originally heard by three judges, then four judges must be consulted, to complete the number of seven at the rehearing (s. 60). In both the above provisions the judgment is held to be that of the Division by whom the rehearing was appointed, after consulting with the other judges. In the case of *Holmes Oil Co. Limited*, 1890, 17 R. 624, Lord Young expressed the opinion that where the judges of a Division are equally divided, they should, before directing the papers to be laid before three

other judges, deliver their own opinions; but this course is not followed in practice. By sec. 11 of the same Act, it is provided that such hearings shall take place on Mondays during the sittings of the Court as often as shall be necessary, but with power to the Court to continue the hearing of any such case on other days. Further, by 6 Geo. IV. c. 120, ss. 23, 24, it is enacted that, in order to preserve uniformity in the decisions of the Court and to settle doubtful questions of law, the judges of either Division may, in all cases in which the judges of the Inner House shall be equally divided in opinion, direct the cause to be heard either by the Inner House judges of both Divisions or by the whole Court; and in such cases as it shall appear to them advisable to have any question occurring before them settled by the judgment of the whole Court, the judges of either Division may order that such matter shall be heard before the whole judges, and judgment shall in all causes be pronounced according to the opinion of the majority of the judges present (*Stewart*, 14 S. 693), and the interlocutor shall bear to be the judgment of the Division before which the cause depends after consulting with the other judges. When the whole Court is consulted, it is competent either to have a hearing in presence before all the judges, or to have cases, *i.e.* written pleadings, prepared by both parties. — [Mackay, *Manual*, pp. 4, 5; Shand, *Practice*, pp. 57, 966.] See CASE.

Contagious Diseases Acts, 1866 to 1869.—The Acts known by this name (29 Vict. c. 35; 31 & 32 Vict. c. 80; and 32 & 33 Vict. c. 96) were passed with the object of diminishing the prevalence of venereal disease in the chief military and naval stations of England and Ireland. They provided that any woman within the prescribed limits of such stations, proved to be a prostitute, might be subjected to compulsory periodical medical examination, and, if necessary, detention in a certified hospital. The Acts, which did not affect Scotland, were repealed by 49 & 50 Vict. c. 10.

Contagious Diseases (Animals). — The enactments relating to the prevention and suppression of contagious disease in animals are consolidated by the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), (as amended by the Diseases of Animals Act, 1896 (59 & 60 Vict. c. 15)). A summary of its provisions is here given:—

AUTHORITIES TO ADMINISTER THE ACT.—The central controlling body is the Board of Agriculture, exercising the powers and duties conferred upon it by this Act and the Board of Agriculture Act, 1889—(s. 1). The local authorities subject to the control of the Board are: (*a*) for burghs to which sec. 14 of the Local Government (Scotland) Act, 1889, does not apply, the magistrates and town council; (*b*) for counties, and burghs to which the aforesaid section applies, and royal burghs not returning or contributing to return a member to Parliament, the county council (ss. 2, 60 (1)).

SEPARATION OF DISEASED ANIMALS.—Every person in possession or charge of a diseased animal must (*a*) keep it separate from uninfected animals; (*b*) give immediate notice to the police, who must inform such authority as the Board may direct. Orders may be made by the Board as to notices, etc., to be given, and for supplementing or varying this section (s. 4) (see *Robertson*, 10 R. (J. C.) 68).

CATTLE PLAGUE.—Where an inspector believes that cattle plague

exists, or has within ten days existed, in any place, he is to sign a declaration, and serve a notice thereof on the occupier: thereupon that place and adjacent lands, etc., become an infected place, subject to the determination of the Board. He may also serve a notice on the occupiers of all lands within a mile: thereupon such lands become part of the infected place, subject as aforesaid. He must also send to the Board and L. A. his declaration and notices. The Board, after inquiry, may by order prescribe the limits of the infected place, or may declare the place uninfected. The Board may at any time, by order, declare any place to be infected, may alter the limits of an infected place, or may declare an infected place to be free from cattle plague (s. 5). The Board may, by order, declare any area wherein an infected place is situate, to be infected; may alter the limits of such area; or declare an infected area to be free from cattle plague (s. 6). They *must* cause to be slaughtered (i.) all infected animals; (ii.) all animals having been in contact with such: and *may* cause to be slaughtered (i.) any animals suspected of infection, or in an infected place; (ii.) any animals within such parts of an infected area as are not an infected place (subject to Treasury Regulations).

Compensation is to be paid (*a*) for an infected animal, half its value before infection, not exceeding £20; in every other case, the value of the animal before slaughter, not exceeding £40 (s. 7).

Infected Areas, etc., for Diseases generally. — *Pleuro-Pneumonia and Foot-and-Mouth Disease.*—Where an inspector of a L. A. believes that pleuro-pneumonia exists, or has within fifty-six days existed, or that foot-and-mouth disease exists, or has within ten days existed in any place, he must sign a declaration and serve a notice upon the occupier; in case of foot-and-mouth disease, also on the occupier of such adjacent lands as he thinks necessary. Thereupon the place becomes an infected place, subject to the determination of the L. A. He must also send his declaration and notice to the Board and L. A. The L. A., after inquiry, with advice of a veterinary inspector, may define the limits of the infected place, and may include adjacent lands therein. They may include part of the adjoining district of another L. A., with the written consent of the latter; or they may declare the place to be free from disease. They must report to the Board the inspector's declaration and their proceedings, with their opinion what area, if any, should be declared infected; and state whether the holding of any fair or market should be prohibited or restricted therein. This section is to be construed subject to sec. 21. Where a L. A. have declared a place to be infected with pleuro or foot-and-mouth disease, they may, on the advice of a veterinary inspector, declare such place to be free from disease: in the former case, not sooner than fifty-six days after its cessation; in the latter, fourteen days, or such period not exceeding twenty-eight days as the Board may by general order prescribe. The Board may by order declare any place to be infected with pleuro or foot-and-mouth disease; may alter the limits of such place; or declare an infected place to be free from disease (s. 8).

Infected Areas.—The Board may declare any area wherein an infected place is situate, to be an infected area; may extend the limits of such area; or, where no infected place exists within such area, may declare it, or part of it, to be free from disease. They may also prohibit or restrict the holding of markets, etc., within an infected area (s. 9). The Board may make provision for declaring places and areas infected with a disease other than those already named, and every place and area so declared infected is to be an infected place or area. They may cancel any declara-

tion made in error regarding any infected place. Where a place or area is declared free from disease, or a declaration is cancelled, such place or area ceases to be infected. An order of the Board or L. A. declaring an infected area or place, or declaring such to be free from disease, is conclusive evidence of the facts whereon the order proceeds (s. 10).

Movement of Animals.—Cattle must not be moved into, within, or out of a place or area infected with pleuro, except in accordance with Sched. I. Pt. I.; and animals must not be moved with reference to a place or area infected with foot-and-mouth disease, except in accordance with Sched. I. Pt. II. (s. 11). [Sched. I. Pt. I. provides: (1) Cattle may not be moved into or out of a place infected with pleuro, except where, as regards movement into such place, they are infected, and except in cases excepted by the Board. (2) In excepted cases, movement must be on conditions prescribed. (3) L. A. may license movement as to parts of an infected area, not being an infected place. Pt. II. is in similar terms, substituting "animals" for cattle, and foot-and-mouth disease for pleuro-pneumonia.]

Infected Circles.—Where the Board, by order, declare that this section shall apply in the case of any disease, and any place becomes infected with that disease, in pursuance of an inspector's declaration, the whole space within half a mile from any part of the infected place becomes an infected circle; but the Board may limit the application of their order to a particular district. Where the place ceases to be infected, the infected circle is dissolved. The Board may make orders for giving notice of, and for limiting and dissolving, infected circles, and for prohibiting or regulating the movement of animals with reference thereto, or for authorising a L. A. to make such regulations. Where two or more infected circles overlap, the whole is deemed to be one circle (s. 12).

The owner or person in charge of any animals in an infected place or area may exclude strangers from his buildings or enclosures by notice affixed thereto (s. 13).

Slaughter.—Slaughter in the Case of Pleuro-Pneumonia, Foot-and-Mouth Disease, and Swine Fever.—The Board *must* cause to be slaughtered all cattle affected with pleuro-pneumonia. They *may* cause to be slaughtered (*a*) any cattle suspected of being so affected; (*b*) any cattle which have been in contact with infected cattle, or have been exposed to infection. Compensation is to be paid (*a*) for an infected animal, three-fourths of its value before infection, not exceeding £30; (*b*) in every other case, its value before slaughter, not exceeding £40. The owner may by written notice require the animal to be slaughtered within twenty-one days (s. 14). The Board *may* cause to be slaughtered (*a*) any animals affected with foot-and-mouth disease, or suspected of being so affected; (*b*) any animals which have been in contact with infected animals, or have been exposed to infection. Compensation is to be paid (i.) for an infected animal, its value before infection; (ii.) in every other case, its value before slaughter (s. 15). The Board have powers with respect to swine fever similar to those just quoted with respect to foot-and-mouth disease; but the compensation for an animal affected with swine fever is a half of its value before infection; in every other case, its value before slaughter (s. 16).

The Board may appoint such additional officers as may be necessary for executing the provisions regarding slaughter (s. 17). Provisions as to costs to be paid out of Pleuro-Pneumonia Account (s. 18).

Slaughter in Disease, and Compensation generally.—With respect to diseases other than cattle plague, the Board may make orders authorising

the slaughter of animals by local authorities, and the payment of compensation out of local rates; and may authorise the slaughter of animals suspected of infection, or having been in contact with or exposed to infection (s. 19). They may reserve for treatment and observation any animal liable to slaughter, subject to payment of compensation. The carcase of a slaughtered animal belongs to the Board or L. A., and is to be disposed of by them. Where sold by a L. A., the money is to be credited to the local rate. If the sum received by the Board or L. A. exceeds the amount paid for compensation, the excess, after deducting reasonable expenses, is to be paid to the owner. A carcase may be buried in the owner's ground, or in any common or unenclosed land, but not in such land by a L. A. without the approval of the Board. Where the owner had insured the animal, the insurers may deduct the compensation paid from the amount payable under the insurance. A L. A. must keep a record relative to slaughter, which is to be admitted in evidence. The Board or a L. A. may withhold, wholly or partially, compensation in respect of an animal slaughtered, where the owner or person in charge has in their judgment been guilty, in relation to the animal, of an offence against the Act; or where, in the case of a foreign animal, it was in their judgment diseased at the time of its landing (s. 20). [The decision of a L. A. refusing compensation, is not subject to review; but they must find and determine that an offence has been committed, and record the same in their minutes. It is not necessary that the outbreak of disease should be traceable to the offence (*Calder*, 18 R. 48).]

Exceptional Powers for Transit, etc.—The Board are to make, by order, such further provision as may be necessary respecting animals affected with pleuro-pneumonia or foot-and-mouth disease, while (i.) exposed for sale for exhibited in a market, etc.; (ii.) placed in a lair, etc., before exposure for sale; (iii.) in transit or being moved by land or water; (iv.) in a foreign animals wharf or quarantine station; (v.) in a slaughter-house or place where animals are kept for slaughter; (vi.) in common or unenclosed land; (vii.) generally, in a place not in the possession or under the control of their owner. By such orders, provision is to be made for the consequences of animals being found in the aforesaid circumstances, with power to the Board to make orders with regard to particular places. Every such order is to have effect, notwithstanding any provision requiring the declaration of a place infected with pleuro-pneumonia or foot-and-mouth disease, or any other provision (s. 21).

Disease and Movement, generally.—Full powers are given to the Board to make regulations for carrying out the purposes of the Act, to which reference may be made for details. They include regulations for movement of animals in infected places and areas, disinfection, disposal of carcases, mode of reckoning compensation, holding of markets and fairs, care of animals during transit, muzzling, etc. of dogs, extending the Act to other diseases or animals, etc. (s. 22). Railway companies must make provision of water and food for animals carried, to the satisfaction of the Board, and must supply the same on request. Where a request for water is not made, so that an animal is without water for twenty-four hours, the consignor and person in charge are each guilty of an offence; the onus of proof lying on the accused; but the Board may prescribe any other period not less than twelve hours. Such charges for food and water supplied, as are approved by the Board, may be recovered either from consignor or consignee, the company having a lien over the animal supplied, or any other animal consigned by or to the same consignor or consignee (s. 23).

Foreign Animals.—Slaughter at Port of Landing.—By Schedule III.

Pt. I., such animals may be landed only at a foreign animals wharf, as defined by the Board, and subject to the control of the Commissioners of Customs; and they may not be moved alive out of the wharf. These regulations apply to all foreign animals other than (*a*) foreign animals prohibited from landing by the Board; (*b*) foreign animals intended for exhibition or exceptional purposes, allowed to land by the Board, subject to Schedule III. Pt. II. (quarantine)—(Diseases of Animals Act, 1896, repealing sec. 24). The Board may make orders prohibiting the landing of animals, carcases, fodder, etc., from a specified foreign country; and they must prohibit the landing of such, whenever they are not satisfied that the circumstances afford reasonable security against the importation of foot-and-mouth disease (s. 25). Sec. 26 is repealed, as from 1st January 1897, by the Diseases of Animals Act, 1896. Notwithstanding anything in the Act, or in any order of the Board, they may permit animals intended for exhibition or exceptional purposes to be landed, without being subject to the provisions of Schedule III. Pt. I. (slaughter at port of landing); but Pt. II. (quarantine) is to apply to such animals (s. 27). With regard to animals brought from the Channel Islands or Isle of Man, the Board may, by order or by licence, alter or add to the provisions of Schedule III. (s. 28). Every order relating to the landing or conveyance of foreign animals must be laid before Parliament (s. 29). Detailed powers are given to the Board to make orders for the execution of the Act with reference to foreign animals, the regulation of ports, etc. (s. 30 (1)). No part of a port may be declared an infected place, except by the Board (s. 30 (2)). Where any part of the district of a L. A. coincides with a port, the Board may, in relation to that port, make any body, other than the L. A., to be the L. A. for the purposes of the Act relating to foreign animals, and may prescribe the local rate and the clerk (s. 30).

General Provisions as to Local Authorities.—Committees.—The provisions in Schedule IV., which deal with the appointment of committees by local authorities, are to have effect, without prejudice to the power of a county council to delegate their powers under sec. 73 of the Local Government (Scotland) Act, 1889: Provided that the Board, in any order authorising a L. A. to make regulations, may direct that such power be exercised only by the L. A. or their executive committee (ss. 31, 60 (6)).

Wharves, etc.—A L. A. may provide wharves, sheds, etc., for the landing and disposal of foreign animals and things. The Markets and Fairs Clauses Act, 1847 (certain sections excepted), is incorporated with this Act; and a wharf provided by a L. A. under this section is a market within the said Act: the prescribed limits are to be the limits of the lands acquired for purposes of this section; and bye-laws are to be approved by the Board, after publication. A L. A. may charge for the use of such wharf, in accordance with said bye-laws, and sums so received are to be applied in payment of interest on money borrowed under the previous Acts and this Act, repayment of principal, and expenses under the Act. The L. A. are to make such returns of expenditure and receipts, in respect of the wharf, as the Board may require. The Board, if satisfied that the tolls should be reduced, may require a L. A. to submit a new schedule of tolls, and on failure may, by order, prescribe new tolls. This section is to apply to a wharf provided by a L. A. under the previous Acts (s. 32). A L. A. may purchase or lease land for wharves, or for burial of carcases, where there is no land suitable belonging to the owner of the animal, or any common or unenclosed land approved by the Board, or for any other purpose; and

they may dispose of lands so acquired, carrying the money received to the credit of the local rate.

Purchase of Land.—With respect to the purchase of land by a L. A., sec. 90 of the Public Health (Scotland) Act is to apply, substituting the local authority and local rate under this Act for those therein mentioned; and the powers conferred may be exercised with respect to land without the district of the L. A. (ss. 33, 61). Where a L. A. fail to execute any of the provisions of the Act, or of an order of the Board, the latter may by order empower a person to do so. Expenses so incurred, including compensation for animals slaughtered, may be recovered with costs from the L. A. at the instance of the Board, an order of the Board being conclusive as to default or other matter stated therein. This section is without prejudice to the right of the Board or any other authority to take proceedings for requiring a L. A. to execute the Act, or an order of the Board (s. 34).

Officers.—Every L. A. must appoint sufficient inspectors and officers: they must keep at least one veterinary inspector, and as many more as the Board may require: an inspector may be removed, on the orders of the Board, for incompetence, negligence, or misconduct (s. 35). Every L. A. and their officers must send such reports and information to the Board as they may require (s. 36). An order or regulation of a L. A. may be proved by production of (i.) a newspaper containing said order as an advertisement; or (ii.) a copy certified by the clerk of the L. A. An order so proved is to be held duly made, until the contrary is proved. An order or regulation of a L. A. authorised by the Act, or by an order of the Board, is alone to be deemed an order of the L. A. (s. 37). The powers conferred on a L. A. by the Act, unless otherwise expressed, are to be confined to their district (s. 38).

Transfer of Powers, etc.—Where the district of one L. A. has a common boundary with another, the two L. A.'s may agree in writing that one shall administer the Act within the district of the other; the expenses are to be allocated in proportion to the value, according to the valuation roll, of the surrendered district as compared with the value of the original area of the administering authority. The district or part thereof surrendered is to be deemed part of the district of the administering authority, and expenses paid by a surrendering authority are to be paid out of the local rate. Where the surrendering authority is a burgh, and the administering authority a county, to the rate of which such burgh is assessed, the provision for payment by the county to the burgh of the proportionate amount paid by the parishes in the burgh is not to apply. One L. A. may agree in writing with another for the appointment of a joint-committee, to exercise all or any of their respective powers in the whole or part of their respective districts; and expenses incurred by such joint-committee are to be allocated in proportion to the value of the component areas, and paid out of their respective local rates. Such an agreement must receive the sanction of the Board. The expression "powers" in this section means all powers except making and levying a rate (ss. 39, 60 (5)).

Expenses of Local Authorities.—The expenses of a L. A. under the Act are to be defrayed out of the local rate; and the necessary sums are to be levied with and as part of the local rate. The local rate is: (*a*) in burghs to which sec. 14 of the Local Government (Scotland) Act, 1889, does not apply, a rate to be levied equally upon owners and occupiers; (*b*) in counties, and burghs to which the aforesaid section applies, and royal burghs not returning or contributing to return a member to Parliament, a

rate within the county to be levied equally upon owners and occupiers as an item of the consolidated county rates, and within such burghs and royal burghs to be ascertained, fixed, and paid to the county council as provided by the aforesaid Act (ss. 40, 60 (1)).

Borrowing Powers.—Where the amount required exceeds sixpence in the pound, a L. A. may borrow at interest on the credit of the local rate, and may mortgage the same for repayment with interest for any term not exceeding seven years. Where the amount exceeds ninepence in the pound, the Secretary for Scotland may extend the term to any period not exceeding fourteen years. As regards borrowing by L. A.'s of counties, the provisions of the Local Government (Scotland) Act, 1889, are to apply, and in the case of L. A.'s of burghs the provisions of the Commissioners Clauses Act, 1847, with respect to the mortgages to be executed by the commissioners, are to be deemed incorporated with the Act; and any mortgagee or assignee may enforce payment of his principal and interest by appointment of a judicial factor. The Public Works Loan Commissioners may, on the recommendation of the Secretary for Scotland, advance money to a L. A. in manner provided by the Public Works Loans (Money) Act, 1875, and any amending Act, the money to be repaid within the aforesaid term. A L. A. may give as security, either with the local rate or separately, the wharf charges authorised herein, and any other funds otherwise unappropriated by law, in which case the limitations respecting the amount of rate and term of years are not to apply (ss. 42, 62).

Police.—The police force of each police area are to enforce the Act and orders of the Board. A constable may detain a person found committing, or reasonably suspected of committing, an offence, and may apprehend such person, if unknown, or failing to give his name and address; and he may detain and examine any animal, vehicle, boat, or thing relating to such offence, and require the same to be taken back to the place wherefrom it was unlawfully moved. Any person obstructing an officer may be apprehended without warrant. Any person apprehended under this section must be taken at once before a justice, and not detained without a warrant longer than necessary, subject to any enactments relating to the release of persons on recognisances taken by a police officer. These provisions respecting a constable extend to any person called by him to his assistance. Wherever a constable stops any person, animal, etc., he must report his proceedings to his superior officer in writing. Nothing herein is to abridge the powers of a constable apart from this section (s. 43).

Powers of Inspectors.—An inspector is to have all the powers of a constable under the Act, or otherwise. He may enter any place wherein he has reasonable ground for supposing (*a*) that disease exists or has within fifty-six days existed: (*b*) that the carcase of a diseased or suspected animal is, or has been, disposed of: (*c*) that there is to be found anything in respect of which there has been failure to comply with the Act or an order of the Board or a L. A.; (*d*) that the Act or an order of the Board or a L. A. is not complied with. He may enter any pen, vehicle, vessel, etc., in respect of which he has reasonable grounds for supposing that the Act or such order has not been complied with; but if required by the owner, he must state his reasons in writing. A certificate of a veterinary inspector that an animal is affected with a specified disease, is conclusive evidence of the fact. An inspector of the Board is to have all the powers of an inspector throughout Scotland, or that part thereof for which he is appointed, and may enter any shed, land, or place for the purpose of ascertaining whether pleuro, foot-and-mouth disease, or swine fever exists,

or has within fifty-six days existed (ss. 44, 63). A vessel in port may be detained on a representation by an inspector of the Board that the Act or an order of the Board or L. A. is not complied with; and the officer detaining the vessel must deliver a copy of the representation to the person in charge thereof. To such a case sec. 692 of the Merchant Shipping Act, 1894, is to apply (s. 45).

General Provisions.—The expenses of burial or destruction of a carcase washed ashore, under direction of a receiver of wreck, are expenses of the L. A., and may be recovered from them with costs by the receiver. Where such carcase was washed ashore from a vessel, the L. A. may recover said expenses from the owner of the vessel, in the same way as salvage is recoverable (s. 46). All orders or documents made in pursuance of the Act are exempt from stamp duty and fees (s. 47). No proof of appointments or handwriting of officers under the Act is to be required. Notices in pursuance of the Act must be in writing, and may be served personally or by post; occupiers of lands to be served, may be so described, without name, unless service is by post (s. 48). The Board may alter or revoke orders, and every order is to have effect as if it had been enacted by the Act; notice thereof is to be given in the *London Gazette*, and published by the L. A. as the Board may direct. Defect of publication is not to affect the validity of any such order (s. 49). The Board are to make annual returns to Parliament (s. 50).

Offences and Legal Proceedings.—A person guilty of an offence against the Act is liable (i.) to a fine of £20; (ii.) if the offence relate to more than four animals, £5 for each animal; (iii.) if it relate to carcases, fodder, litter, dung, etc., a fine of £10 for each half-ton after the first half-ton, in addition to the first fine of £20 (s. 51). The following are offences (proof of lawful authority or excuse resting on the accused): (i.) contravention of the Act, or order of the Board, or regulation of L. A. (*Dunlop*, 16 R. (J. C.) 14; *Roberts*, 17 R. (J. C.) 19; *Sharp*, 20 R. (J. C.) 12); (ii.) failure to isolate an animal, or give notice of disease; (iii.) failure to do anything required by the Act, or order of Board or L. A.; (iv.) doing anything declared unlawful by Act or Board; (v.) doing or omitting anything declared by Act or Board an offence; (vi.) refusing to admit to lands, etc., or obstructing an officer; (vii.) throwing carcases of diseased or suspected animals into a river, etc., or into the sea within three miles from shore. A second or subsequent offence within twelve months of the first may be punished by one month's imprisonment (s. 52).

Offences Punishable by Two Months' Imprisonment in lieu of Fine.—(i.) To do anything which requires a licence without one, with intent to evade the Act; (ii.) with like intent to do a licensed thing after expiry of licence; (iii.) to use an incomplete or untrue licence, unless in reasonable ignorance; (iv.) with like intent to alter, counterfeit, or use any instrument; (v.) (vi.) to attempt to obtain a licence, etc., by making a false declaration or pretence, unless in reasonable ignorance; (vii.) to grant an instrument, materially false or without lawful authority, unless in reasonable ignorance; (viii.) to issue, with like intent, a licence, etc., in blank; (ix.) to use such a licence, unless in reasonable ignorance; (x.) to obtain compensation by fraud; (xi.) to dig up a buried carcase without authority or excuse, proof whereof lies upon accused; (xii.) to use a vessel, vehicle, etc., for carrying animals, where prohibited by Board, without authority or excuse (s. 53).

Offences may be prosecuted and fines recovered summarily; but this does not apply to proceedings under the Customs Acts. The order of a L. A. may be enforced by warrant of the Sheriff, at the instance of a procurator-

fiscal (ss. 54, 64). Persons landing or shipping animals contrary to the Act, are liable to the penalties under the Customs Act, as well as the present Act; and the animal or thing is to be forfeited (s. 56). Certain presumptions against persons charged with offences. An accused person may tender himself and be examined as a witness. Offences are to be deemed to have been committed either in the place of occurrence or where the accused is when proceedings are taken. The Court may direct half of any fine to be paid to the person proceeding for the same, otherwise fines are to be paid, (*a*) in the Sheriff Court, to the Queen's Remembrancer; (*b*) in the J. P. Court, to the county collector; (*c*) in the Burgh Court, to the burgh treasurer; (*d*) in the Police Court, to the police commissioners' treasurer (ss. 57, 64).

Miscellaneous.—"Cattle" means bulls, cows, oxen, heifers, and calves. "Animals" means cattle, sheep, goats, all other ruminating animals, and swine. "Disease" means cattle plague (*i.e.* rinderpest), contagious pleuro-pneumonia, foot-and-mouth disease, sheep-pox, sheep-scab, or swine fever (*i.e.* typhoid fever of swine, soldier purples, red disease, hog cholera, or swine plague). "Carcase" includes meat, bones, hide, etc. "Inspector" means an inspector appointed by the Privy Council, Board of Agriculture, or a L. A. "Veterinary Inspector" means one who is a member of the Royal College of Veterinary Surgeons, or qualified as approved by the Board, or who holds the veterinary certificate of the Highland and Agricultural Society of Scotland (ss. 59, 63). All deeds granted by a L. A. in Scotland, must, in addition to being sealed, be signed by two members of the L. A. and the clerk (s. 60). The prior Contagious Diseases Acts are repealed, except the clauses dealing with the regulation of Dairies and Milk-shops (s. 78).

[See DAIRIES, COW-SHEDS, AND MILK-SHOPS.]

Contempt of Court.—Contempt of Court is a branch of the law dealing with the administration or course of justice, and consists in setting the authority of the Court at defiance by despising its authority, or by attempting to influence the course of justice, or in acts of disobedience to its orders or decrees. In Scotland, every Court, whether civil or criminal, superior or inferior, has at common law an inherent right to punish acts of contempt. Erskine, i. 2. 8, thus states the rule: "Every judge, however limited his jurisdiction may be, is vested with all the powers necessary either for supporting his jurisdiction and maintaining the authority of the Court, or for the execution of his decrees. Hence the Court of Session, though its jurisdiction be merely civil, has an inherent power of punishing those who insult any of the judges while the Court is sitting, or who shall obstruct the execution of its decrees." (See also Stair, iv. 36. 7 and 8, *D.* 2. 1. 2.) This statement does not mean that all Courts have equal powers in dealing with cases of contempt of their authority, but simply that all Courts, however limited their jurisdiction, have an equal right to vindicate their authority. Therefore the law of Scotland does not recognise the distinction that exists in England between the jurisdiction, in matters of contempt of Court, that can be exercised by Superior Courts of Record Inferior Courts of Record, and Courts which are not Courts of Record. (Oswald on *Contempt*, 14–15, *Ex parte Fernandez*, 1861, 10 C. B. (N. S.) 3: *Skipworth's* case, 9 Q. B., per Blackburn, J. 233). But while this is so, and while it is for the Court to say whether its authority has been set at defiance, still no Court can exceed its authority, and every exercise of this jurisdiction by an inferior Court, or even by the Court of Session, is, as will be seen, subject

to review. The judgments of the High Court of Justiciary, however, as it is a Court of last resort, are necessarily exempt from review. The Court of review can thus say whether the offence amounts to an act of contempt. In other words, it decides whether the judge or Court has rightly exercised its jurisdiction (*Hamilton* v. *Anderson*, 1856, 18 D., L. J. C. Hope, p. 1019).

Contempt of Court is sometimes divided into (1) direct, and (2) indirect or consequential acts of contempt. It will be convenient here to treat the subject under the three heads of: 1st, insults offered to the Court itself by attacks on the judge or Court, or by disobeying orders of Court; 2nd, attempts to influence the course of justice, though it is frequently difficult to distinguish between these two heads; and, 3rd, non-observance of the decrees of Court.

Contempts of the first kind are thus explained: "All such disorders or misdemeanours committed in Court during the progress of a trial as are a disturbance of the judge in the exercise of his functions, or a violation of that deference which ought to be observed toward him when proceeding in his office. The hindrance, therefore, or molestation, of the officers of Court in their duty, the use of any threatening or contumelious speech or gesture there with relation to the judge or the trial, any open expression of censure or approbation of the proceedings of the judge or the jury, as by acclamation or otherwise; nay, the wilful and repeated breaking of silence in Court;—all these are examples of this sort of petulant contempt for which the magistrate may reprove the delinquent of his own knowledge, and upon the spot. All wilful disobedience or gross neglect of the orders or precepts of Court, in matters relative to any trial, is in like manner necessary to be subdued without delay" (Hume, ii. 138). Baron Hume is here speaking of criminal Courts, but there can be no doubt that the same rules hold in civil Courts, and it is in virtue of this right that orders of Courts for the regulation of order are made and enforced. Everyone, moreover, whether litigant, witness, legal practitioner, or other person, is bound to obey them. To give some examples. The following acts have been held to be contempts committed by litigants, namely:—Writing letters to judges relative to a depending process (*Lord Advocate* v. *Hay*, 1822, 1 S. 288); behaving contemptuously when receiving sentence (*Clark*, 1829, S. (Just.) 215); a panel appearing at the Bar in a state of intoxication (*M'Lean*, 1838, 2 Swin. 185); a defender in a case writing to the pursuer to say that he intended to put the oath of calumny to her as soon as the forms of Court allowed, and that she must remember that many things stated by her on record were utterly false (*Paterson*, 1865, 3 M. 1119). But merely addressing unbecoming words to a magistrate is not necessarily contempt of Court (*Laurie*, 1882, 9 R. (Just.) 22; see also *King* v. *Davidson*, 1821, 4 Barn. & Ald. 329). It is also a contempt in England if a party state untruthfully that he is a creditor or contributory of a limited liability company (53 & 54 Vict. c. 63, s. 7 (6)). The following have been held to be acts of contempt by witnesses:—Remaining mute and refusing to answer questions (*Kerr*, 1822, S. (Just.) 68); appearing in Court in a state of intoxication (*Allan*, 1826, S. (Just.) 172); a witness, who was not a Quaker, refusing to be sworn (*Tweedie*, 1829, S. (Just.) 222); escaping by violently forcing the padlock of a door after having been duly enclosed until called on to give evidence (*Innes*, 1831, S. (Just.) 238); producing a certificate of good character in mitigation of sentence, which contained a statement which, if not false, was at least a suppression of the truth (*Nimmo*, 1839, 2 Swin. 338); giving up a bill, alleged to be forged, to a third party on payment of its contents, after

having been cited to appear as a witness and produce it (*Lord Advocate* v. *Galloway*, 1839, 2 Swin. 465). Prevarication by a witness. And here it is not necessary that the judge who holds that the witness has prevaricated should state the circumstances — it is enough that he hold that there was prevarication (*M'Ewen*, 1829, S. (Just.) 213; (*Macleod*, 1884, 11 R. (Just.) 26). It is, however, exceedingly rare to punish witnesses summarily for prevarication (*ib.* Ld. Young, p. 34). The following have been held to be contempts by legal practitioners:— A Writer to the Signet writing a letter to the Lord President reflecting on his judicial conduct (*Lord Advocate* v. *Jamieson*, 1822, 1 S. 285); a statement in a reclaiming petition, prepared by an agent, that the Sheriff-Substitute nearly always decided his (the agent's) cases against his clients, and that he doubted his impartiality (*Broatch*, 1878, 5 R. 702); refusing to expunge a statement from a record which the Sheriff-Substitute considered insulting (*Anderson*, 1858, 3 Macq. 363); removing a process against the orders of Sheriff-Substitute before whom the case was depending (*Watt*, 8 M., 1870 (H. L.), 77; *Watt*, 1 R., 1874 (H. L.), 21). As regards other persons: There can be no doubt that members of the public who are present in Court during a trial or other proceeding, and behave in a disorderly manner, or refuse to obey the orders of Court, are guilty of contempt. It may also here be mentioned that the Lords of Justiciary have a special jurisdiction over persons in stations of public trust in matters pertaining to criminal police. "In the exercise of this control they may summarily inflict a suitable censure on messengers or macers for negligence, extortion, or any other abuse in the citation of panels, witnesses, or assizers towards trial in the Court of Justiciary, or in taking or conveying of prisoners on their warrants. On jailors, also, for cruelty or oppression towards prisoners for crimes. . . . On Sheriffs for failure to attend the judges on their circuits, or inaccuracy in the execution of the Porteous rolls, or of the warrants of the Lords of Justiciary for the conveyance of criminals, and the like. On the Clerks of the Court of Justiciary for exacting improper fees, or for gross omissions, blunders, or falsehoods in the acts of their official duty" (Hume, ii. 141). Many of the acts here mentioned would now probably be otherwise punished; but Sheriffs, for instance, who are bound to attend on the judges on circuit, under the Act 1487, c. 103, would be guilty of contempt if they failed to do so. In England, High Sheriffs who fail to attend in a proper manner on judges on circuit are heavily fined for contempt; and in Ireland, police who refused to give assistance to a Sheriff in carrying out an order of Court were held guilty of contempt (*Attorney-General* v. *Kissane*, 1892, 32 L. R. Ir. 220; *Miller*, 1838, 4 Bing. N. C. 574).

The second division of contempt of Court — namely, attempts to influence the course of justice—includes such acts as attacks made on judges with a view to influence their judicial conduct, or slandering the proceedings of the Court, or publications which are prejudicial to the fair trial of a cause. Slandering the proceedings of the Court and attacks made on judges are contempts, even though committed shortly after a trial is over (Hume, ii. 139; *M'Leod*, 1820, S. (Just.) 3). The jurisdiction of the Court is, moreover, well established. Thus in *Lord Advocate* v. *Hay* (*sup.*), during the dependence of a cause at the instance of Hay, he wrote to several judges, members of Parliament, and others, letters relative to the process, some of which were printed. A petition and complaint was presented against him, and a proof was taken, with the result that the Court held he was guilty of having defamed, calumniated, and libelled

several of the judges and the administration of justice, and his conduct was therefore found to be a high contempt (see also *Lord Advocate* v. *Prentice*, 1822, 1 S. 385). The Court also has sustained its jurisdiction when the party slandering it was not a litigant (*Lord Advocate* v. *Jamieson* (*sup.*)). On the other hand, it is not a contempt of Court to slander or libel a judge, provided the slander or libel has no reference to any particular case (*Bahama Islands*, 1893, A. C. 138).

In modern times, however, the most frequent contempts of this kind consist in the publication of articles in the press or elsewhere, which affect the parties to a cause, and so tend to prejudice its fair trial. This may be done by a litigant, as in *Henderson*, 1824, 3 S. 384. And even though the publication be not treated as an act of contempt, it will be stopped if it tend to prejudice the fair trial of the cause (*Miller*, 1835, 13 S. 644; *Smith*, 1835, 14 S. 172). On the other hand, the publication may be by a third party, such as the editor of a paper, or by one contributing an article to it (*Watson & Murray*, 1820, S. (Just.) 9; *M'Laughlan*, 1826, 5 S. 147). The general rule regarding publication is that individuals or the press are entitled to discuss all matters of public interest, even though they should, in so doing, attack individuals, subject only to the risk of being sued for damages for libel. But if, as a result of their articles, an individual is apprehended on a criminal charge, or institutes civil proceedings, they may be stopped from publishing further articles regarding him, if the Court consider that their doing so would tend to prejudice the fair trial of the cause (*Smith*, 1892, 20 R. (Just.) 52; *Edmond*, 1829, S. (Just.) 299); and it would be an act of contempt to refuse to obey such an order. This jurisdiction, however, can only be by the Court of Session and High Court of Justiciary. Accordingly, if parties, who are to be tried or are litigating in the Sheriff Court or one of the inferior Courts, desire to have the publication of such articles stopped, the appropriate method is to present a petition for interdict.

In England the rule is the same. Thus in *Charlton's* case, 92 My. & C. 316, Charlton had written letters to a Master in Chancery, and also to the Lord Chancellor, reflecting on their conduct. The Lord Chancellor remarked that if the object was to taint the source of justice and to obtain a result of legal proceedings different from what would follow in the ordinary course, it is a contempt of the highest order. Again, in *Skipworth's* case (*sup.*), a true bill had been found against a defendant (Tichborne). It was held to be a contempt to address public meetings stating he was not guilty.

At the same time, it is clear that it is not a contempt of Court to publish what occurs in open Court. "The publication by newspapers of what takes place in Court at the hearing of any cause is undoubtedly lawful; and if it be reported in a fair and faithful manner, the publisher is not responsible though the report contain statements or details of evidence affecting the character of either of the parties, or of other persons; and whatever takes place in open Court falls under the same rule, though it may be either before or after the proper hearing of the cause. The principle on which this rule is founded seems to be, that as Courts of justice are open to the public, anything that takes place before a judge or judges is thereby necessarily and legitimately made public; and, being once made legitimately public property, may be republished without inferring any responsibility" (per Lord President Inglis in *Richardson*, 1879, 7 R. 237). In that case it was decided that the right to publish only applied to public documents, and that a summons called in Court, but upon which no other step of procedure had followed, was not a public document. (See

also *Gilfillan*, 1824, 3 S. 21.) In addition to this, as has already been said, the Court itself is the judge whether an act of contempt has been committed or not; and it may hold that there has been no contempt even though statements are published which are manifestly intended to influence the public (*M'Leod*, 1892, 20 R. 218). In that case certain defenders wrote to a newspaper, which had published a closed record which contained the pursuer's amendments put on at adjustment, a letter stating that these statements were a tissue of libellous falsehoods, yet the Court, in the circumstances, held that there had been no contempt.

The third kind of contempt consists in disobedience to orders of Court. It is clear that all Courts must have jurisdiction to enforce their decrees. In criminal cases no difficulty occurs, nor in civil cases, whether these be ordinary decrees, which are enforced by execution, or decrees *ad factum præstandum*, which must be implemented by the party against whom they are directed, under the penalty of imprisonment. But there are other orders of Court, either to do or not to do something, the non-performance of which is treated as a contempt of Court. Of these, the best illustration is the case of the BREACH OF AN INTERDICT (*q.v.*), which is an order not to do something which, but for the order, it would be lawful to do. There are, besides, numerous positive orders the non-performance of which is punished as contempt. Thus, in *Muir*, 1868, 6 M. 1125, a mother of a child and its stepfather were ordered to deliver up the child, and, having failed to do so, warrant was granted to take the child from the mother. The officers being unable to find the child, the Court ordered the mother and stepfather to appear at the Bar. The stepfather alone appeared, and, having declined to give information regarding the mother's address, was committed for contempt. Again, in *Leys*, 1886, 13 R. 1223, the respondent, who was the paternal grandfather of certain pupil children, refused, when ordered to do so, to deliver them up, or to state where they were. He was accordingly found guilty of contempt of Court. (See also *Ross*, 1885, 12 R. 1351; *Fisher*, 1894, 21 R. 1076.) So determined is the Court to have its orders obeyed, that it will not allow decree for expenses to be pronounced in name of the agent-disburser when the client is acting in contempt (*Bloe*, 9 R. 894).

Procedure.—When the contempt occurs in Court, it is usually disposed of on the spot by the judge or magistrate before whom it was committed, and who may, and generally does, act of his own motion. But if the party who commits the act of contempt is absent, the case may be disposed of summarily within a reasonable time thereafter, and by a judge or magistrate other than the one before whom it was committed (Hume, i. 406, ii. 138; *Petrie*, 1889, 17 R. (Just.) 3).

When the contempt is not dealt with on the spot, the procedure is either (1) simply to ordain the party to appear at the Bar, which is usually done on motion by the other party to the case; or (2) to proceed, if the matter is to be disposed of in the Court of Session, by a petition and complaint; if by the High Court of Justiciary, or in the Sheriff Court, by a petition; and if in a Court of summary jurisdiction, by a complaint. The former course is generally adopted when the party fails to do something he is ordained to do, as in *Leys* (*sup.*). The latter course is adopted in cases where the party is ordained to abstain from doing a certain act, as in cases of breach of interdict. The prayer of the petition and complaint or petition may simply be to stop further publication or other act complained of, or it may also conclude for penalties. When a party refuses to appear at the Bar when ordered to do so, an order for his apprehension will be

granted; but when he appears at the Bar, he will be heard in his defence, as in other cases.

The punishments inflicted are admonition, suspension from office in the case of parties practising before the Court (*Hamilton, sup.*), or fine and imprisonment. Admonition is often a sufficient punishment for slight acts of contempt happening in Court, but it is rarely considered adequate where the contempt consists in disobedience to orders of Court. It was, however, the punishment inflicted in the case of *Clark*, 1839, 1 D. 955, where a breach of interdict had been committed. But that case was very exceptional. Fine or imprisonment, or both, are the usual punishments. As to the amount of punishment, see Lord Brougham in *Hamilton*, 1850, 7 Bell's App. 272. When it is imprisonment, it can either be for a definite or indefinite period, as, for instance, until an order be obeyed. When a person is incarcerated for contempt, he is considered to be a "civil" and not a "criminal" prisoner, and his treatment is regulated by the special rules which are made from time to time, under the authority of the Secretary for Scotland, for "civil" prisoners, in terms of the Prisons (Scotland) Act, 1877, s. 47. It may here be mentioned that persons imprisoned for wilful failure to obey decrees for alimentary debts are considered civil prisoners, and treated in the same manner as prisoners committed for contempt of Court (Civil Imprisonment (Scotland) Act, 1882, s. 4 (6)).

Review.—Judgments or sentences punishing for contempt are all subject to review. Thus, if a sentence of suspension from practice is pronounced, or if a fine be imposed in an inferior Court, an appeal lies from it to the Court of Session, and in the case of the Sheriff Court, with the ordinary appeal from the Sheriff-Substitute to the Sheriff (*Hamilton*, 3 Macq. 363, *sup.*; *Munro*, 1877, 5 R. 308). Similarly, any like sentence pronounced by the Court of Session can be appealed to the House of Lords (A. S. 10 Aug. 1784, case of *James Curse*; *Hamilton, sup.*, 7 Bell's App. 272); and in both cases the Court of review can recal or modify the sentence. When a sentence of imprisonment is pronounced in an inferior Court, the appropriate remedy, in order to obtain liberation, is to present a SUSPENSION AND LIBERATION to the High Court of Justiciary (*M'Leod*, 1884, 11 R. (Just.) 26); but when the sentence of imprisonment is pronounced by the Court of Session, such a mode of review is incompetent (Hume, ii. 509).

NOTE.—Contempt of Court is the subject of statutory regulation in certain local municipal Acts, such as the Edinburgh Police Act, 1879, in s. 341, and the Glasgow Police Act, 1866, in s. 129.

Contexture is one of the forms of artificial or industrial ACCESSION (*q.v.*). The rule of ownership, where contexture has taken place, is that the ownership of the thing which is accessory and has been merged in the principal, passes to the owner of the principal. The doctrine is derived from the Roman law, in which various cases were discussed as to which of two articles joined together should be considered the principal, and which the accessory. When some material belonging to A. is wrought into material belonging to B., the thing so used ceases to be the property of A., and belongs to B. Thus, if A.'s embroidery or purple is worked on to B.'s coat, B. becomes the owner of the embroidery or purple, even if the purple be of more value than the coat (Gaius, ii. 79; Just. Bk. ii. 1. 26). If A. paints a picture on B.'s wall or ceiling, the picture belongs to B. (Ersk. Bk. ii. 1. 16). In Roman law, written characters acceded to the paper on which they

were written. A poem written by A. on B.'s parchment belonged to B. But, on the other hand, a picture painted by A. on B.'s tablet belonged to A., because it was held that the tablet acceded to the picture (Just. Bk. ii. 1. 34; *Dig.* xli. 1. 9. 2). According to the law of Scotland, writings would not fall as accessory to the paper on which they were written (Stair, ii. 1. 39); but in the other examples given, the rule of the Scots law is the same as that of the Roman. In all cases where materials belonging to A. have been joined to materials belonging to B., and had so passed into B.'s ownership, B. is liable to A. for the value of the materials used. If B. had taken the materials *malâ fide*, their value would be ascertained by A.'s oath *in litem* (Bankt. ii. 1. 17). Not only the ordinary value would be due, but the greatest value according to the estimate of the former owner *per pretium affectionis* (Stair, ii. 1. 39).

The following general rules are laid down to decide the question which of two articles joined together is accessory, and which is principal:—

(1) If one of the two substances cannot exist separately, the other is regarded as the principal, as in the case of "paper, the design and use whereof is for writing, and the use whereof is consumed and lost by writing, it doth follow the writing" (Stair, *ut supra*).

(2) If one material is taken to ornament or complete another, it is accessory to the other.

(3) If the question cannot be decided in accordance with those rules, the article of the greater bulk is held to be the principal, and, failing bulk, the article of the greater value (Ersk. ii. 1. 15, 16; Bell, *Prin.* s. 1298; see also *Wylie & Lochhead*, 1870, 8 M. 552).

See ACCESSION.

Contingency of a Process.—*Remit ob contingentiam.*—When two or more cases having a contingency, *i.e.* relating to the same subject-matter, or having a close connection with one another, come to depend before different Divisions or Lords Ordinary, the Court before which the second or subsequent processes depend is directed to remit them to the consideration of the Division or Lord Ordinary before whom the first (or leading) process has been brought (48 Geo. III. c. 151, s. 9). This is done by either party upon motion, or it may be at the instance of the Court *ex proprio motu*, for the Statute is imperative (*M'Neill*, 1866, 4 M. 608). The removal is accomplished by interlocutor remitting the second or subsequent process to the leading one. When a case appears in the calling list, it is held to be brought before the Lord Ordinary and Division specified in the *partibus*; and when two or more cases having a contingency appear in the calling list upon the same day, that which is brought before the senior Lord Ordinary is deemed the leading process. In the case of appeals appearing in the Single Bills of the two Divisions upon the same day, that before the First Division is held to be the leading appeal, and the other or others are remitted to it (A. S. 7 Dec. 1871, ss. 1, 2, and 3). But when two summonses raising precisely the same question were called before two Lords Ordinary upon the same day, the one first served was deemed the leading process, and the other was dismissed on the plea of *lis alibi pendens* (*Lowe's Trs.*, 1893, 1 S. L. T. 25). To constitute a contingency, it is not necessary that the actions should be between the same parties, though that is always an important element for consideration. They must, however, relate to the same subject-matter, and it is for the Court to determine in each case whether there is such a connection between

the litigations, as to render it expedient that they should be tried together. If there is such a contingency, there must be a remit to the leading process (*Bryce*, 1859, 22 D. 213). For illustrations of the cases in which contingency has been held to exist, and where it has not, see Mackay, *Manual*, 269. As soon as an action has ceased to depend, by reason of final decree being pronounced and extracted, it cannot be contingent to any other process. If, however, extract has been superseded, there is still a depending process, and there may be a remit (*Gordon*, 1827, 6 S. 257). The effect of the remit is merely to bring both processes into the same Court. They remain distinct in every particular, and no step taken in one affects the other. It may, however, be expedient to conjoin them. See CONJOINING OF ACTIONS. There is no remit *ob contingentiam* from one Sheriff to another, except in maritime cases (Dove Wilson, *Sh. Ct. Practice*, 256, 448).

Transference ob contingentiam.—When there is a contingency between a case depending in the Court of Session, in either the Inner or the Outer House, and another in an inferior Court, the latter may be transferred to the Court of Session by either party, upon satisfying the Court that there is such a contingency. The procedure used formerly to be by note of advocation *ob contingentiam* presented in the Bill Chamber, but that has now been superseded by the simpler means prescribed by the Court of Session Act, 1868, s. 74. The party moving obtains from the Sheriff Clerk a certified copy of the pleadings that have been lodged in the inferior Court, and of the interlocutors in the cause. This copy he lays before the Lord Ordinary or Division before which the Court of Session cause is depending; and if, on consideration of it, it appears that there is sufficient contingency between the actions, a warrant will be granted to the Sheriff Clerk to transmit the in the Single Bills of the Inner House or the motion roll of the Lord inferior Court process to the Court of Session. The procedure takes place Ordinary, and the reasons for transmission are stated orally by counsel. The decision of the Court or of the Lord Ordinary upon the motion for transmission is final at that stage, but the motion may be renewed (Court of Session Act, 1868, s. 75). The motion must be sustained if the contingency is shown to exist, for the provisions of the Court of Session Act are also imperative. For illustrative cases, see Mackay, *Manual*, 272.

[See Mackay, *Practice*, i. 512, 518; *Manual*, 268; Ivory, *Form of Process*, ii. 51; Shand, *Practice*, 442, 500; Coldstream, *Procedure*, 97, 100; Balfour, *Handbook of C. of S. Pract.* 51, 52; Dove Wilson, *Sh. Ct. Practice*, 584.]

Contingent Debts (in Bankruptcy).—In relation to the distribution of a bankrupt debtor's estate under sequestration, contingent debts stand on a different footing from ordinary debts in several respects. A creditor in a contingent debt is not, in respect of it, qualified to petition, or concur in a petition, for the sequestration of his debtor (19 & 20 Vict. c. 79, s. 14; *Forbes*, 1890, 18 R. 182; see *Morrison*, 1832, 10 S. 259; *Gordon*, 1851, 13 D. 1154; *Stuart*, 1891, 19 R. 223). Thus, where a successful litigant obtained an award of expenses and decree for interim execution, pending an appeal to the House of Lords, he was held not entitled to petition thereon for his opponent's sequestration (*Forbes, supra*). And the same rule applies to the case of one who stands debtor as the drawer or endorser of a bill, prior to default on the part of the acceptor (see *Morrison, supra; Gordon, supra*). The Bankruptcy Act of 1856 contains no definition of contingent debts. A claim of damages, prior

to judgment, is not a contingent debt, but an unconstituted claim of uncertain amount. As, however, a petitioning or concurring creditor is required by the Act to produce the vouchers of his debt in evidence of his qualification, the absence of these in such a case will preclude the claim from being founded on in support of a petition (19 & 20 Vict. s. 21; see *Miller*, 1884, 11 R. 729).

While creditors in contingent debts are thus not entitled to participate in proceedings for sequestrating their debtor, they are entitled, when sequestration has been obtained, to share in the distribution of his estate, although on a different footing from ordinary creditors. Under the early bankruptcy law, the sole right of a contingent creditor was to have a dividend set apart for him pending the issue of his contingency. The Sequestration Act of 1839 (2 & 3 Vict. c. 41, s. 49) introduced a new principle, by permitting such creditors to have their claims valued, and to vote and draw dividends upon the valued amount; and this principle is embodied in the provisions of the existing Bankruptcy Act of 1856. Sec. 53 of the Act provides as follows:—

"LIII. *Valuation of claim depending on a contingency.*—When the claim of a creditor depends upon a contingency which is unascertained at the date of lodging his claim, he shall not be entitled to vote nor to draw a dividend in respect of such contingent debt, but he may apply to the Sheriff, if the trustee has not been elected, or, if elected, to the trustee, to put a value on such debt, and the Sheriff or trustee (as the case may be) shall put a value thereon as at the date of such valuation; and on such value being fixed such creditor shall be entitled to vote and draw dividends in respect of such value, and no more: Provided that if such contingency have taken place before the debt has been valued, such creditor may vote and draw dividends in respect of the amount of the debt, but the same shall not disturb any former dividends allotted to other creditors; and when such application is made to the Sheriff or trustee, notice thereof shall be given to the bankrupt and petitioning or concurring creditor; and the judgment of the Sheriff or trustee shall be subject to review, and any creditor who has claimed on the estate may appeal, or appear and be heard on any appeal."

The provisions of this section are not imperative: and while it is usual for contingent claims to be valued in terms thereof, a contingent creditor is entitled, if he so elect, to let his claim remain unvalued, and have a dividend corresponding thereto set apart to await the issue of the contingency (see sec. 129). This is the only course possible where the contingency is of such a nature as to be incapable of valuation (see *Mackenzie*, 1855, 17 D. 751, per Ld. Deas, Ordinary; *Garden*, 1860, 22 D. 1190). Thus, where a claim under an obligation of warrandice was made on a bankrupt estate in respect of the dependence of an action of reduction of the claimant's title, it was held, after the claimant had been assoilzied and an appeal to the House of Lords had been intimated, that the claimant was entitled to be ranked as a contingent creditor, and to have a dividend set apart to meet his claim until the issue of the appeal (*Garden, supra*). Dividends thus set apart are, pending the purification of the contingency, lodged by the trustee in bank, in an account in name of the trustee and commissioners, at the same time as the dividends to ordinary creditors are payable (19 & 20 Vict. c. 79, s. 129). Where a contingent claim remains unvalued, the creditor has no vote in the sequestration in respect of it; and while his dividend will be larger than upon valuation should the contingency issue favourably to him, he will, in the opposite event, receive no dividend at all.

A creditor who has obtained his claim valued in terms of sec. 53 must abide by this course (see *Gemmell*, 1853, 16 D. 264).

As the Act contains no provision as to the mode of valuation, it is a matter for the discretion of the trustee or the Sheriff, as the case may be, what particular mode should be adopted in any particular case. A deliverance by the trustee or the Sheriff, valuing or refusing to value a claim, is subject to review (19 & 20 Vict. c. 79, s. 53). In the case of a trustee's deliverance, the appeal may be taken to the Sheriff or the Lord Ordinary on the Bills within fourteen days (*ib.* s. 169). A deliverance by the Sheriff may be appealed to the Inner House, or, in time of vacation, to the Lord Ordinary on the Bills, within eight days (*ib.* s. 170). The Act provides no form for the appeal. The Lord Ordinary's judgment in either case is subject to review by reclaiming note in common form within fourteen days from its date (*ib.* s. 171). Any creditor claiming on the estate may appeal, or appear and be heard on an appeal (*ib.* s. 53). Pending an appeal, the contingent creditor is entitled to vote on the amount at which his claim has been valued (see *Watson*, 1848, 10 D. 1414).

Questions may arise as to the effect of a bankrupt's discharge upon contingent claims against him. The general rule is that discharge operates a release from all debts which are capable of being ranked for in the sequestration. Whether there may be debts depending on contingencies so remote and intangible as not to form good grounds for ranking, nor to be affected by discharge, is a question which has not been elucidated by decision (see *Taylor*, 1889, 16 R. 711). It has been held in England that the liability of a shareholder of a company for future calls is a debt capable of being valued and ranked for in bankruptcy even where the company is a going concern at the date of the bankruptcy (*In re Mercantile Mutual Marine Insur. Assoc.*, 25 Ch. Div. 415).

Special provisions are contained in the Bankruptcy Act, 1856, for claims in respect of annuity debts. See ANNUITY.

In cessio, claims in respect of contingent debts are not regulated by any specific statutory provision. The terms of sec. 1 of the Act of Sederunt anent Cessios of 22 Dec. 1882, however, seem to contemplate the debt of a petitioning creditor being one presently due. Further, the 6th section of the same Act of Sederunt provides that "the rules of the Bankruptcy (Scotland) Act, 1856, regarding the nature and form of affidavits or claims of creditors for ranking, and the valuation of securities and deductions to be made, and regarding the documents of debt to be produced therewith, shall *mutatis mutandis* apply to claiming and being ranked for dividends in processes of cessio."

[Goudy on *Bankruptcy*, 130, 190, 329, 345, 427, 475.]

Continuation of the Diet.—*Civil.*—According to the style still in use in the Court of Session summons, the defender is cited to appear "before the Lords of our Council and Session at Edinburgh, or where they may happen to be for the time, the 7th (or 14th) day next after the date of your citation, in the hour of cause, *with continuation of days*, to answer at the instance of the pursuer in the matter libelled." This is a relic of the old procedure, which prescribed two diets of compearance for the defender (see DIET): and although the practice was put an end to by the Judicature Act, 1825, the old style survives. For the present practice, see CALLING LIST; CALLING SUMMONS; INDUCIE; PROTESTATION. It is provided by the Court of Session Act, 1868, s. 26, that it is not to be competent by consent

of parties to prorogate the time for complying with any statutory enactment or order of the Court, whether with reference to the making-up and closing of the record or otherwise. There is a similar provision in the Sheriff Courts Act, 1876, s. 19, though the Sheriff may, on cause shown, grant at least one continuation. Appointments for lodging and adjusting issues are also peremptory, and the time fixed cannot be extended of consent of parties (A. S. 15 July 1865, s. 12). In cases, however, where diets or periods are fixed by Act of Sederunt, the Court holds that it has a discretion to relax the rules which it has itself framed for the conduct of business, and will do so when circumstances warrant it (*Boyd, Gilmour, & Co.*, 1888, 16 R. 104). When the diet is not statutory, a continuation may generally be obtained of consent, or by satisfying the Court that the opposite party will not be prejudiced. It is otherwise in criminal proceedings, for which *vide infra*. See also ADJOURNMENT.

In criminal law, see CRIMINAL PROSECUTION.

Continuous Voyages.—It was formerly the policy of every European State in possession of colonies, to restrict traffic between the mother country and the colonies, to its own merchant vessels. During the Anglo-French war of 1756, France, unable, owing to the maritime superiority of Great Britain, to prosecute her colonial trade in French ships, threw it open to the Dutch, who were neutrals. Great Britain, however, captured and condemned the Dutch vessels which availed themselves of this licence, on the ground, partly, that they were interfering in the war to the prejudice of Britain's belligerent interests, partly, that by engaging in a trade hitherto confined to French subjects, they were virtually incorporating themselves in the mercantile marine of the enemy. The action of the British was the first explicit assertion of the rule of international law, now known as the "Rule of 1756," which declares that "neutral subjects are not permitted to engage in a trade with the colonies of a belligerent during war, which is not permitted to foreign vessels during peace" (cf. *dictum* of Ld. Mansfield, *Berens* v. *Rucker*, 1 W. Bl. 314). During the Anglo-French wars of the Revolution, neutral merchants to whom France and Spain had opened their colonial trade, endeavoured to evade liability under this rule by breaking the voyage from mother country to colony, or colony to mother country, by the interposition of a neutral port. The British Prize Courts, however, condemned neutral vessels taken on the voyage *from* the colourable port, on the ground that it was an extension of the previous voyage, the two voyages forming a continued voyage from mother country to colony, or colony to mother country, as the case might be (cases of the *Essex*, *Orne*, *Enoch*, *Rowena*, and *Respect*, referred to in judgment in the *Maria*, 5 C. Rob. 369). The doctrine in accordance with which vessels were thus condemned was designated the Doctrine of Continuous Voyages. It has been applied even to the case of a vessel which discharged its cargo at the interposed neutral port, bond being given in proper form for the payment of duties, and was then reladen a few days later with part only of her former cargo, the Court holding that an honest attempt to bring the cargo into the common stock of the neutral country had not been proved (*The William*, 5 C. Rob. 385).

On the other hand, a vessel may relade cargo discharged at a neutral port, and escape condemnation if captured on the subsequent voyage, if it can be proved that there was a *bonâ fide* original intention to sell the cargo at the neutral port (*The Maria*, cited above).

At the present day the doctrine of continuous voyages, in its application to the Rule of 1756, is of little moment, owing to the changes in the colonial policy of most European States, which practically render that rule inoperative. But during the American Civil War the doctrine received an extraordinary extension, which has been universally reprobated outside the United States. It was applied to cases of contraband and of blockade. Cargoes were condemned as contraband which were destined *for*, and captured on their way *to*, neutral ports, if they were intended, or even if there was ground for presuming that they were intended, for an ulterior belligerent destination (*The Stephen Hart*, Blatchford, *Prize Cases*, 307; *The Bermuda*, 3 Wall. 514; *The Peterhoff*, 5 Wall. 528. See CONTRABAND). Similarly vessels were held liable to confiscation from the commencement of their voyages, although having *bonâ fide* neutral destinations, if it could be inferred that the cargoes, after being landed at the neutral port, were to be forwarded, whether by the same or by other vessels, to a blockaded port, unless the owners were ignorant of the ulterior destination of the cargo (*The Springbok*, 5 Wall. 1; *The Peterhoff, ut supra*. See BLOCKADE). The *Springbok* and *Peterhoff* were restored, on appeal, by the Supreme Court, one of the members of which subsequently acknowledged that the decisions of the American Prize Courts were due partly to prejudice and partly to ignorance.

[Manning, *Law of Nations* (Sheldon Amos), p. 260; Hall, *International Law*, p. 660, 694, note; Holland, *Manual of Prize Law*, 22, 38.]

Contra non volentem agere non currit præscriptio.—See PRESCRIPTION.

Contraband.—See SMUGGLING.

Contraband of War.—On the outbreak of hostilities, each belligerent State is entitled, amongst other permissible acts of interference with the trade of neutral subjects, to prevent the carriage to the enemy's country by neutral vessels of certain commodities capable of being devoted to warlike uses. To these the name has been given of contraband of war; and the rules by virtue of, and in accordance with, which belligerents exercise this right of prevention are known as the law of contraband, and are usually classified under international law, though recently it has been argued, as in the case of the law of blockade, that they are part of the municipal system of every country. See BLOCKADE, *ad init.*

ESSENTIALS OF CONTRABAND.—Before neutral goods can be regarded as contraband, two conditions must be satisfied—

1. The goods must be bound for a hostile destination.
2. The goods must be fit for purposes of war.

1. The destination of the vessel is conclusive as to the destination of the goods, and the destination of the vessel will be considered hostile, not only if the ultimate port to which she is bound is hostile, but also if any intermediate port of call be hostile, or if in any part of her voyage she is to go to the enemy's fleet at sea. When the ship's destination is stated in her papers to be dependent on contingencies, the presumption is that the destination is hostile, if under any of the contingencies she may touch at a hostile port; but this presumption may be rebutted by clear proof that the

master has definitively abandoned a hostile destination, and is pursuing a neutral one (*The Imina*, 3 C. Rob. 167; *Trende Sostre*, cited in the *Lisette*, 6 C. Rob. 390, n.). An interposed neutral destination will be disregarded if from the papers it appears that the original destination was hostile, and the vessel is taken on her way to the hostile port (*The Richmond*, 5 C. Rob. 325).

If the destination of the vessel be hostile, the destination of the goods is hostile, even though it may appear from papers or otherwise that the goods are not intended for the hostile port, but are to be deposited at an intermediate neutral port, or forwarded to an ulterior neutral port. On the other hand, if the destination of the vessel is neutral, the destination of the goods is to be considered neutral, notwithstanding that the goods have an ulterior hostile destination. The American Prize Courts, however, during the Civil War, condemned cargoes on board vessels bound for neutral ports, when an ulterior hostile destination for the goods was suspected by an unwarrantable extension of the doctrine of continuous voyages. See CONTINUOUS VOYAGES.

2. The law of contraband, as gathered from a comparison of treaties, and from an examination of marine ordinances, the practice of States in different wars, and the opinions of jurists, has never definitely fixed the list of goods which a belligerent is entitled to regard as fit for purposes of war, beyond a very limited class. This class consists of those articles which are fit for warlike uses *exclusively*—arms and munitions, including, now, ships of war. The goods with respect to which uncertainty exists are those which are fit for purposes of war *and of peace also*, which Grotius spoke of as *res ancipitis usus*. With regard to these, usage and opinion has not only varied from time to time, but at any one time is found to be contradictory. If any generalisation be permissible, it may perhaps be said that the tendency has been for weaker maritime powers, conscious of the small advantage to be derived from a lengthy list, and for theoretical jurists, anxious to prevent the operations of war from pressing unduly upon neutral commerce, to reduce the catalogue to narrow dimensions.

The present article embodies a brief statement of the view taken by the British Prize Courts of the law of contraband—apart from treaty stipulations—with respect to *res ancipitis usus*.

Certain of these, along with those articles which are fit for warlike purposes exclusively, are regarded as absolutely, and in their very nature, contraband. For example, the materials of ammunition; naval stores, such as masts (*The Staat Embden*, 1 C. Rob. 26), sailcloth (*Neptunus*, 3 C. Rob. 108), pitch and tar (*Jonge Tobias*, 1 C. Rob. 329), copper (*Charlotte*, 5 C. Rob. 275), hemp (*Evert*, 4 C. Rob. 354). In the case of hemp, a relaxation has been allowed when it is the produce of the neutral exporter's country (*The Apollo*, 4 C. Rob. 158). To these articles which the British Prize Courts regard as absolutely contraband, the *British Manual of Prize Law* adds military equipment, clothing and stores, marine engines and their component parts, marine cement and its materials, and iron in various forms, *e.g.* anchors. Other articles, according to the practice of the British Prize Courts, are *conditionally* contraband,—that is to say, they are liable to be regarded as *contraband* in particular circumstances, of which the most important is their destination to a port of naval equipment as distinguished from a mercantile port, or to the enemy's fleet at sea. Thus provisions (*Jonge Margaretha*, 1 C. Rob. 188; *Ranger*, 6 C. Rob. 125), wine (*Edward*, 4 C. Rob. 68), rosin (*Nostra Signora de Begona*, 5 C. Rob. 98), tallow (*Neptunus*, 3 C. Rob. 108), timber (*Twende Brodre*, 4 C. Rob. 33), are condemned as contra-

band when the destination is a port of naval equipment. To these conditionally contraband articles the *Manual* adds money, telegraphic materials, materials for railways, coals, and horses, which, were cases to arise, would presumably be dealt with by the British Prize Courts on this footing, as also, it may be conjectured, would bicycles.

With regard to enemy—despatches and persons of importance in the military and civil service of the enemy taken by a belligerent on board neutral vessel, *vide* UNNEUTRAL SERVICE.

PENALTY.—Cargo.—According to British practice, if the cargo consist of goods which are condemned as absolutely contraband, it is confiscated; but goods condemned as conditionally contraband are often subjected to pre-emption merely, *i.e.* the British Government purchases the goods at their mercantile value, together with a reasonable profit, usually calculated at ten per cent. *Haabet*, 2 C. Rob. 174; Naval Prize Act, 1864, 27 & 28 Vict. c. 25, s. 38). Goods not contraband found on board with contraband goods, and belonging to the same owner, are confiscated with the contraband goods.

Vessel.—A vessel carrying contraband goods is liable to be arrested with the goods on board and detained in port pending inquiry by a Prize Court. In ordinary cases the vessel is visited with no further penalty than the loss of time thus occasioned, loss of freight, and expenses (*Mercurius*, 1 C. Rob. 288). But the vessel will be confiscated if she belongs to the same owner as the contraband goods; or if her owner is privy to the carriage thereof; or if the cargo is contraband under a treaty between the captor's State and the State to which the owner of the vessel belongs (*Neutralitet*, 3 C. Rob. 295; or if the vessel carries false papers (*The Franklin*, 3 C. Rob. 217). The liability of the vessel to detention and, in the cases indicated, to confiscation, attaches from the commencement of the voyage, but is deposited with the cargo, unless simulated papers are carried, when it has been held that a vessel may be condemned on a return voyage, even though the cargo she was carrying was not purchased with the proceeds of the sale of the contraband goods (*The Margaret*, 1 Act. 335). But this case has been severely criticised by American and foreign jurists (Wheaton, *Elem.* pt. IV. ch. iii. 26; Calvo, 2465; Heffter, 161).

CONTRACTS FOR IMPORTATION OF CONTRABAND.—It has been held in England (*ex parte Chavasse, in re Grazebrook*, 34 L. J., N. S. Bank. 17), that contracts between neutral subjects for the importation of contraband into a belligerent country are not illegal by the law of the neutral State. See BLOCKADE, *ad fin.*

[Grotius, *De Jure Bell ac Pacis*, iii. 1–5; *Bynkershook*, Q. J. P. i. x.; *The Armed Neutralities*, 1780 and 1800; C. de Marten, *Recueil*, i. 193, and ii. 215; Ortolan, *Diplomatie de la Mer*, ii. 190; Manning, *Law of Nations*, edited by Sheldon Amos, 352; Hall, *International Law*, 665; Holland, *Manual of Naval Prize Law*, 18.]

Contract.—*Definition.*—A contract is a bilateral obligation, and may be defined as the "voluntary agreement of two or more persons whereby something is to be given or performed or abstained from upon one part, for a valuable consideration, either present or future, or a counter engagement, on the other part" (Ersk. *Prin.* (19th ed.) iii. 1. 6). Neither party to a contract can enforce it unless each has voluntarily given his serious consent to be bound, and both have agreed to the same thing. It is essential that there should be *consensus in idem placitum* (Stair, i. 10; More, *Notes*, 102; Ersk. *Inst.* iii. 1. 16; Bell, *Prin.* 5–15; Bell, *Com.* (7th ed.), 312 *seq.*).

Constitution and Proof of Contract.—By the Roman law, contracts were constituted either *re, i.e.* by the intervention of things, by words, by writing, or by sole consent. According to Scots law, contracts are said to be real, written, and consensual. This classification is not of great value, for "every obligation to which writing is not indispensable is effectual where consent is proved" (B. P. 16). Under *real contracts* are included loan, commodate, pledge, deposit, and certain innominate contracts. They are so called because they require an act of delivery, or payment, or performance on one part to conclude the bargain. They may be proved by parole testimony: but the object of the proof is twofold, *i.e.* to establish (1) the agreement; (2) the act of real intervention (B. C. (7th ed.) 313). "*Written contracts*, in strict technical language, are" (according to Bell, *Prin.* s. 18) "those to which authentic written evidence is required, not merely in proof, but in solemnity: as obligations relative to land, or obligations agreed to be reduced to writing, or those required by Statute to be in writing. On other occasions, writing is required only in evidence." In many cases it is a matter of mere academic interest whether writing is required to the constitution of a contract, or merely *in modum probationis* (cf. Ld. Watson in *Wallace*, 1895, 22 R. 56, at p. 66, as to cautionary obligations, which, by sec. 6 of 19 & 20 Vict. c. 60, must be in writing). Writing is also required in the assignment of a patent, or copyright of a book, and in the sale or mortgage of a ship (Bell, *Prin.* 1456–58). Innominate contracts must be proved by writing (*Stewart Craig*, 1882, 9 R. 501; *Reid*, 1887, 14 R. 789); while either writ or oath is essential to establish trust or a loan of money (Bell, *Prin.* 2257; *Haldane*, 1872, 10 M. 537; *Nicol*, 1878, 6 R. 216; *Robb*, 1884, 11 R. 881. For the form of writing and its effects, see under Holograph, Privileged, Probative Writings and Delivery; see also Stamp Acts and Deeds). To *consensual contracts* belong sale, permutation, location, society, and mandate. All these contracts, unless parties themselves stipulate for writing, may be proved by parole testimony. The English law, which requires writing or part performance to the completion of important contracts, may be studied in Pollock, Anson, Addison, Chitty, Leake, etc.

Communication of Intention: Offer and Acceptance.—Parties to a contract must communicate to each other their intention to be bound. This is effected by means of offer and acceptance. An offer may be express or implied, *i.e.* inferred from facts and circumstances. It may be made either to an individual or to the public generally, *e.g.* by advertisement or circular. The words used must indicate a definite offer, and not merely an offer to deal which calls for a counter offer, as in the case of a sale by auction. Offer is to be distinguished from promise (*Malcolm*, 1891, 19 R. 278; *Miller*, 1892, 19 R. 550). It implies something to be done by the other party, and is only binding on the offerer when accepted by the offeree. Acceptance, therefore, clinches the bargain. But the acceptance must exactly meet the offer, which must be taken subject to the qualifications and limitations with which it is made. To import new terms or conditions into the acceptance is in effect to make a new offer, which must, in its turn, be accepted before the contract is concluded (*Johnston*, 1855, 18 D. 70; *Jack*, 1865, 3 M. 554; *Canning*, 1886, 16 Q. B. D. 727). Acceptance must be made *debito tempore*, *i.e.* within the time specified by the offer, or within a reasonable time (usually ordinary course of post), and before withdrawal of the offer when no time is specified. Acceptance may be express or implied from facts and circumstances (see analysis of contracts constituted by purchase of railway, car, concert tickets, etc., in Pollock, Ch. I.; *Carbolic Smoke Ball Co.*, 1893, 1 Q. B.

256—contract constituted by compliance by a member of the public with conditions in advertisement offering reward). In order to be operative, an acceptance must be communicated to the offerer. Where, however, parties correspond by letter or telegram, it is held that the post office officials are the agents of the offerer. The bargain is clinched when the acceptance is despatched: recal of the offer subsequent to that date is ineffectual, and the offerer is bound although the acceptance be delayed in the transmission, or is lost, or fail to reach him (Pollock, 35, 36; *Household Fire Insur. Co.*, 1879, 4 Ex. D. 216; *Dunlop*, 1848, 6 B. App. 195; *Byrne*, 5 C. P. D. 344; see contrary opinion by Ld. Shand in *Mason*, 1882, 9 R. 383). An offer may, in the absence of an undertaking to keep it open for a specified period of time, be withdrawn any time before acceptance: and it is probable that the acceptor would not be held bound if withdrawal of his acceptance reached the offerer before or at the same time as the acceptance (see LOCUS PŒNITENTIÆ; HOMOLOGATION; REI INTERVENTUS; OFFER AND ACCEPTANCE, etc.). In addition to authorities already cited on offer and acceptance, see Leake on *Contracts*, pp. 12, 13; Benjamin on *Sales*, pp. 28–35, and 45–56; Addison on *Contracts*.

Capacity to Contract.—Parties to a contract are not bound unless the law recognises them as capable of giving valid consent. Incapacity to give such consent may arise from professional or political status, age, or marriage (see under ALIEN; MINOR (PUPIL); and MARRIED WOMEN). Lunatics, and drunken persons in a state of such complete intoxication as to be temporarily deprived of reason, are also incapable of entering into contracts (see under INSANITY and DRUNKENNESS). Agents, companies, and corporations contract subject to certain limitations, as to which see under their respective heads.

Reality of Consent.—Parties to a contract must not only be capable of giving consent to a contract, but the consent given by them must be real, not merely apparent or fictitious. "It is necessary," says Bell (*Com.*, 7th ed., i. 313), "to an effectual obligation, that the contracting parties shall be agreed on all the essential points of the engagement. There must be no error in the substantial parts of the agreement, destroying consent; no constraint, such as to overmaster a mind of ordinary vigour; no fraud, giving birth to the contract and misleading the objector as to its true nature and substance" (see law stated and cases cited under ERROR; FRAUD; CIRCUMVENTION; FORCE). There is this distinction between the effect of error and the effect of fraud on a contract. In the former case, there is no consent, and the contract is void, *i.e.* it may be set aside, even although third parties have acquired rights thereunder. In the latter case, there is apparent consent induced by trickery or device, and the contract is said to be voidable, not void, *i.e.* it can only be set aside while matters remain intact, and if the rights of third parties *bonâ fide* acquired are not thereby prejudiced (B. P. 11–14; B. C. 313).

Consideration and Subject-Matter.—Contract being a mutual obligation, both parties must be bound, or neither. The consideration inducing anyone to enter into a contract is the obligation undertaken towards him by the other. From the definition of contract given above, it is seen that one of the essentials thereof is valid consideration given to the parties contracting. By this, however, it is not meant that the consideration should be an adequate return for the obligation undertaken, but merely that it should not be elusory (see CONSIDERATION). The subject-matter of the obligation undertaken by either party may be either a fact or a thing. But things exempted from commerce, either by nature, by the destination of the owner, or by Statute, cannot be the subject of obligations. And as regards facts, a

man is not bound by his contract where he obliges himself to do what is naturally or legally impossible (see CONDITIONAL OBLIGATIONS; ILLEGAL AND IMMORAL CONTRACTS). "But all facts in themselves possible are the subject of obligation though they should be beyond the power of the party bound, who ought not to have undertaken what he knew or might suspect could not be performed by him" (Ersk. iii. 3. 84; B. C. (7th ed.) 313).

Extinction of Contract.—A contract is ordinarily extinguished by the performance of each party thereto of his obligation towards the other, *i.e.* delivery of the thing or performance of the fact on the one side, and payment of the price on the other. For equivalents to payment, see under COMPENSATION; CONFUSIO; DELEGATION; NOVATION. Or parties to a contract may, by agreement or consent, waive their rights under the contract: in which case evidence of the dissolution of the contract should be similar to that of its constitution (see DISCHARGE). And although ordinarily, where parties undertake obligations which they cannot perform, they are liable in damages, there are certain cases where impossibility of performance of the obligation undertaken extinguishes the contract. This is so if the impossibility arise from an existing state of things unknown to the parties at the date of the contract. For example, if two parties enter into a contract as to the sale of a cargo on a particular ship, and the cargo is assumed to be in existence, while it afterwards turns out that it was at the bottom of the sea, the contract is extinguished, neither party being liable to the other in damages (see *Couturier*, 1856, 5 H. L. C. 673). Similarly, if a contract relate to the performance of some purely personal act, *e.g.* the painting of a picture by an artist, supervening incapacity relieves from the consequences of a breach of contract. The accidental destruction of a building where a man is employed may have the same effect (*Taylor*, 3 B. & S. 838). And where two parties contract, the one to employ the other as sole agent in a certain business at a certain place for a period named, it is an implied condition of the contract that it may be brought to an end by the business being discontinued (*Patmore*, 1892, 19 R. 1004; *S.S. "State of California" Co. Lim.*, 1895, 22 R. 562; see *Rhodes*, 1876, L. R. 1 A. C. 256). It is different where a party undertakes absolutely to employ another for a definite period of years (*Ex parte Maclure*, L. R. 5 Ch. App. 737). Even the destruction of his manufactory was in one case (*Turner*, 1891, 1 Q. B. 544) held no excuse for a party not performing his contract to employ a commission agent (see *Ross*, 1894, 21 R. 396; Pollock, 380 *seq.*; Leake, 59 *seq.*, and cases cited there).

Breach of Contract.—If one party to a contract fail to fulfil the obligations he has undertaken thereunder, he may be compelled to do so by action of implement under the sanction of damages; or the party who was willing to implement the contract, and has suffered from the breach, may simply sue for damages against the party in default. In the case of breach of promise of marriage, no action lies to enforce implement, though an action of damages against the party failing to fulfil his promise may be brought. For the amount of damages, direct or consequential, that may be recovered, see under DAMAGES. See OBLIGATION; QUASI-CONTRACT.

Contract of Marriage.—See MARRIAGE CONTRACT.

Contributory.—This term (which was first introduced by the Statute 11 & 12 Vict. c. 45, s. 3) is defined by the Companies Act, 1862 (s.

74), to mean, "every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up." The persons so liable to contribute are described (s. 38) as "every present or past member." The liability is limited to what is sufficient to meet the debts of the company, the costs of winding up, and the payment of such sums as may be required for the adjustment of the rights of the contributories among themselves. The liability is further subject (s. 38) to certain qualifications, and in particular that a past member is not liable if he has ceased to be a member for more than a year before the commencement of the winding up, or in respect of debts contracted after he ceased to be a member, or unless existing members are unable to pay; and that, in the case of a company limited by shares, members shall not be liable beyond the amount unpaid on their shares.

As to the nature of the contributory's liability, it is (s. 75) "deemed to create a debt (in England and Ireland of the nature of a specialty) accruing due from such person at the time when his liability commenced" (*i.e.* when he became a member (*Gallctly's Trs.*, 1880, 8 R. 74)), "but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability."

It is one of the first duties of the Court after a winding up order (s. 98), or of a liquidator in a voluntary winding up (s. 133 (8)), to settle a list of contributories; and in a winding up under supervision, the Court sanctions it (s. 151). In settling the list, the Court has power to rectify, where necessary, the register of members (ss. 35 and 98); and the list requires (s. 99) to be made up so as to distinguish between persons who are contributories in their own right, and those who are representatives of or liable to the debts of others. The list of present members is called the A list, and of past members the B list—in both cases divided, as above, into first and second parts. The B list is not made up till it appears that the present members are unable to pay the amount unpaid on their shares, and discharge the debts of the company.

The settlement of a list of contributories thus turns on the question who are or were members of the company, of which the register of members is *primâ facie*, but not conclusive, evidence (s. 37); but may involve an inquiry into the various modes and circumstances in which persons become, or agree to become, members (s. 23),—*e.g.* by subscribing the memorandum of association, or by allotment, agreement, transfer, or transmission to executors, trustees, or other representatives,—and also a consideration of the cases of married women, minors, and others subject to curatory, and their guardians; also the case of those who have surrendered or forfeited their shares. On these subjects, and on enforcing liability, set off, and other points affecting contributories, see JOINT STOCK COMPANY; CALL.

Contributory Negligence.—This is a plea taken by a defender on the assumption that negligence on his part has been established, and is usually expressed in the words: "The pursuer by his negligence having caused, or materially contributed to, the injury complained of, the defender is not liable in reparation therefor." The plea, if sustained, is a complete defence, and does not operate merely in mitigation of damages (*Florence*, 1890, 18 R. 247). To be effectual, however, it must be as clearly established as the ground of action requires to be, being of the nature of a counter issue, and the *onus* being on the defender to substantiate it (*M'Martin*, 1872, 10 M. 413). It is also

necessary to show that the pursuer's act, besides being negligent, was the proximate cause of the accident, or, in other words, that the negligence of the defender would not have caused the accident but for the supervening negligence of the pursuer (*M'Naughton*, 1858, 21 D. 163). The pursuer by his negligence must have severed the causal connection between the defender's negligence and the injury which occurred (*Thomas*, 1887, L. R. 18 Q. B. D. 694, 697). In order to discover which of two or more negligent acts was the proximate cause of the injury, the order in time of their occurrence must be regarded. Keeping this in view, the rules may be formulated thus: (1) If B. has been negligent, but A., by his subsequent negligence, fails to avoid the injury, A. cannot sue B.; (2) if A. has been negligent, but B., by his subsequent negligence, has failed to avoid injuring A., A. can sue B.; (3) where A. and B. have been contemporaneously negligent, neither can sue the other (*The Bernina*, 1888, L. R. 12 P. D. 89; affd. L. R. 13 A. C. 1; Pollock, 4th ed., p. 421). It is to be remembered that it is only a negligent act which involves liability or bars the recovery of damages, as the case may be; and that when the negligence is all on one side, it does not affect the liability of the negligent person that subsequent non-negligent acts have intervened. In such a case, the question of contributory negligence does not arise.

(1) *Defender Primarily and Pursuer Subsequently Negligent.*—The general rule is well exemplified in the case where defender put up a pole in front of his house and negligently left it abutting on the public road, and in the dusk of the evening pursuer came riding along at a fast rate and collided with it. As there was light enough for a person, riding with ordinary care, to have seen and avoided the pole, the defender was held not liable. The fact that he was in fault, did not relieve the pursuer of the obligation to use ordinary care for himself (*Butterfield*, 1809, 11 East, 59). The same consideration prevented a pursuer from recovering damages where, the defenders having failed to take proper precautions in working a railway on a public quay, the pursuer proceeded to cross, without looking to see that the lines were clear (*Barnett*, 1891, 28 S. L. R. 339: *Plant*, 1870, 21 L. T. R. 836; contrast *Roe*, 1889, 17 R. 59). But if the defenders by their action put the pursuer in such a position that extra precautions are necessary, the duty is on them, and not on pursuer, to take them. Thus, where a railway company ran a train of unusual length, so that the last carriage stopped short of the platform, and pursuer stepped out in the dark and was injured, the accident was attributed to the fault of the railway company in not giving warning to the passengers that they were exposed to a new and exceptional risk (*Aitken*, 1891, 18 R. 836; *Potter*, 1873, 11 M. 664; *Monaghan*, 1886, 13 R. 860). Where also pursuer is placed in a position of peril and difficulty by the fault of the defender, and in exercising his best judgment for his safety he commits an error which assists in producing the injury, he is not held to be guilty of contributory negligence (*Hine Brothers*, 1888, 15 R. 498).

(2) *Pursuer Primarily and Defender Subsequently Negligent.*—Where a pursuer has been primarily negligent, his negligence will not be regarded as "contributory" if it might, in the circumstances which happened, have been unattended with danger but for the defender's fault, and if it had no proper connection as a cause with the damage which followed (*Spaight*, 1881, L. R. 6 A. C. 219). A defender may not plead the negligence of the pursuer when it is the want of care on defender's part which has been the immediate cause of the mischief (*Smith*, 1891, 28 L. R. Ir. 1. 8). On this principle the plea of contributory negligence has failed where: Pursuer's servants negligently left trucks on a siding, and defender's engine-driver pushed them

forwards against a bridge which the trucks were too high to pass under, and instead of investigating the cause of the resistance, drove on his engine and broke the bridge down (*Radley*, 1876, L. R. 1 A. C. 754): Pursuer, a child, was on a railway line through the negligence of his parent, and defenders, knowing that he was there, began shunting operations without sending him out of danger (*Haughton*, 1892, 20 R. 113): Pursuer negligently anchored his boat in the route of certain steamers, and defender, who could have avoided the boat, ran it down (*Carse*, 1895, 22 R. 475): Pursuer, a young boy, crept under lorry left standing in street; and defender, without looking to see that all was clear, jumped on the lorry and drove on (*Morison*, 1896, 23 R. 564): Pursuer left a donkey hobbled on the highway, and defender drove into it (*Davies*, 1842, 10 M. & W. 546): Pursuer left a barge without any look-out on it; and defender, seeing it, continued to steer his steamer in a course that resulted in a collision (*Tuff*, 1858, 5 C. B. (N. S.) 573).

(3) *Pursuer and Defender Concurrently Negligent.*—In this case the injury is as much the result of the negligence of the one party as of the other, and consequently neither has a right of action. Illustrations of this class of case are naturally confined to collisions, as where a person, crossing a crowded thoroughfare, is driven over by a person driving at too great a speed and without keeping a proper look-out (*Ramsay*, 1881, 9 R. 140); or, crossing a railway line without keeping a look-out, is run down by an engine, the driver of which fails to sound his whistle (*Dublin, etc., Railway*, 1878, L. R. 3 A. C. 1155). See also *Renney*, 1890, 18 R. 294; revd. by H. of L. 19 R. (H. of L.) 11).

On the Part of Children or their Parents.—A child who places himself in a dangerous position may have sense enough to have taken better care, and in that case may have been negligent; or he may be too young to exercise care, and in that case the question comes to be whether his parents or the defenders have been negligent in not taking precautions for him. As to the child himself, it is impossible to lay down any age at which he may be considered fit to take care of himself, and consequently liable for the consequences of negligence. The manifest or latent character of the danger which threatens him must be regarded equally with the intelligence which the child may be presumed to possess. A boy of nine, who was injured by falling into a manhole in a sewer, which was unfenced on one side, was held to have caused his injury by his negligence in running along the street, and looking in another direction from that in which he was going (*Adams*, 1884, 11 R. 852); and so was a boy of six, who attempted to run across the street in front of a tramway car which was travelling at too high a speed (*Fraser*, 1882, 10 R. 264). Whereas a girl of thirteen, who was injured while attempting, contrary to orders, to clean a carding machine while it was in motion, was held entitled to recover (*Sharp*, 1885, 12 R. 574). Whether a child of six is bound to see the danger of an unfenced stream or similar risk, is a question upon which it has been said the law is in a somewhat unsettled condition (*Gibson*, 1893, 20 R. 470; cases collected in Glegg, p. 47).

In the cases where children are assumed not to have sufficient intelligence to be guilty of negligence, negligence may be imputed to their parents, so as to free the defenders from liability (see *Royan*, 1889, 17 R. 103; *Ross*, 1888, 16 R. 86). But, in accordance with the rule above laid down, if the defenders, by the exercise of care, could have prevented the accident, they will be responsible. This is illustrated in the case of an accident to a child on a railway siding, on which it was, in law, a trespasser,

and on to which it had strayed, through the antecedent negligence of its parents. The line in question was a dangerous place, being next a public square, from which children were in the habit of going on the line; and on the occasion in question a gate in the fence had been left open and unwatched. It was laid down that persons who are engaged in dangerous operations may be chargeable with a special duty for the protection of those who are too young or infirm to take care of themselves with effect. The special duty to take unusual precautions to meet an exceptional case must necessarily be measured by the knowledge of the person charged with such duty that a special risk has arisen. That special duty arose in the case under consideration, from the fact that the defenders' servants, engaged in shunting operations, knew that a child was at that time on the rails, and exposed to danger from the operations. The duty was to take such precautions as were reasonably possible for the child's safety; and failure to do so was regarded as the proximate cause of the injury (*Haughton*, 1892, 20 R. 113; *Gibson*, 1893, 20 R. 466; *Hamilton*, 1893, 20 R. 995).

On the Part of Infirm Persons.—Infirmity is not negligence, nor is it negligent for an infirm person to visit crowded and busy streets (*Boss*, 1832, 5 C. & P. 407); and a defender, driving negligently, cannot defend himself by saying that a more active person could have got out of the way (*Clerk* v. *Petrie*, 1879, 6 R. 1076). But pursuer, on account of his infirmity, may have to exercise greater care than a person of ordinary faculties requires to use. A lame or a deaf man, for instance, ought not to place himself in a thoroughfare without making extra use of his eyes (*Stapley*, 1865, 35 L. J., Ex. 7).

On the Part of a Fellow-Servant of Pursuer.—The plea of contributory negligence has been taken where the defender, not being the employer of the pursuer, and a fellow-servant of the pursuer, have jointly caused the pursuer's injury. It has been repelled, however, as the defence of "fellow-servant" is maintainable only by the employer of the pursuer (*Adams*, 1875, 3 R. 215). The plea is also ill-founded when stated by an employer who has been in fault along with a fellow-servant of the pursuer, since both are liable, and a servant is not understood by his contract to have freed his employer from the consequences of personal fault (*Matthews*, 1865, 3 M. 506).

A Jury Question.—Contributory negligence is a question for the jury, and the Court will not overturn a finding on that point (*Woods*, 1886, 13 R. 1118; *Thomson*, 1876, 4 R. 115; *Yarmouth*, 1887, L. R. 19 Q. B. D. 647).

[Pollock on *Tort*; Glegg, 38–49.] See Negligence.

Contumacy is the wilful refusal to obey a lawful summons, or disobedience to the rules and orders of the Court. In criminal procedure, if the criminal does not obey the citation, the Crown cannot proceed against him, for it is against the spirit of our law to prosecute a person in his absence: all that the Court can do is to pronounce sentence of fugitation against the criminal, by which all his moveable estate is escheated to the Crown (Ersk. iv. 4. 83), his bail, if there be any, is forfeited, and he is deprived of all personal privilege or benefit of the law (Hume, ii. 270, 271). The prosecutor must be present in Court or the case cannot proceed. The Lord Advocate, and he alone, may appear by deputy. In civil actions, if the accused fails to appear, the judge proceeds to take cognisance of the cause as though he had appeared, and decerns against him in absence.

—[Stair, iv. 3. 28 *et seq.*; Ersk. iv. 1. 7.] See FUGITATION; DECREE IN ABSENCE; REPONING; CONTEMPT OF COURT.

Convention of Burghs.—The Convention of Burghs is the representative of the burghs in their united and corporate character, and is one of the most ancient remains of the constitution of the kingdom of Scotland. It was instituted by the Act James III. 1587, c. 17, which ordained the burghs of Scotland to meet yearly to treat on the welfare of merchants' merchandice, guide rule and statutes for the common profit of the burghs, in the Acts of Parliament made thereanent, and anent the privileges of the burghs. Subsequent Statutes were passed extending and confirming these privileges. The burghs are represented by commissioners appointed by each burgh. Edinburgh nominates two commissioners, but other burghs are entitled to appoint one only. The burghs in convention from time to time fixed their qualification for the office, which was that the Commissioners must "tyne and win" with their burghs, by being burgesses within them, and contributing to their upkeep. Subsequently the Convention authorised Edinburgh to appoint two assessors, and the other burghs one, in addition to the commissioners, to advise the commissioners in the business with which they had to deal. These assessors have the privilege of speaking on any subject coming before the Convention, but can only vote in the absence of the commissioners. The Convention came in place of the Court or Parliament of the four burghs of Scotland, which was presided over by the Lord High Chamberlain, and was instituted for many other purposes similar to those delegated to the Convention. The Court of the four burghs consisted of the burghs of Edinburgh, Stirling, Berwick, and Roxburgh. Lanark and Linlithgow came in place of the two latter burghs when these fell into the hands of the English. The burghs were represented in the Court by two or three of their burgesses respectively. This Court, in 1405, appointed all the burghs south of the Spey to attend its Conventions. The decisions of the Court of the four burghs were final; and by statutory enactment those of the Convention are also declared final, enforceable summarily by a warrant passed on an extract of the decree certified by the Clerk of Convention. "Since the middle of the sixteenth century, this assembly of representatives from all the burghs of the kingdom has been annually held, and its proceedings have been conducted with much regularity. As a deliberative body, its attention has been frequently directed to the state of national commerce and manufacture; and where the measures which have been deemed expedient have exceeded the limits of that power of more minute regulation which it has often assumed, the Convention has been frequently instrumental in obtaining Acts of Parliament for the promotion of the objects in view. In questions and controversies between different burghs, it has frequently exercised a sort of judicial authority, or power of arbitration; and in the administration of particular burghs, besides adjusting the forms and modes of electing their magistrates and councils, it has been not unfrequently appealed to for the purpose either of checking or of affording its sanction to those acts which have proved fatal to the original endowments of so many of them. As an executive body, its primary function has been to apportion their respective shares of the general land tax or cess, of which one-sixth part is imposed on the "estate of burghs," but from a small portion of which they have been relieved by towns of an inferior class, to which the exclusive privileges of trade have been communicated. And lastly, the Convention

has long exercised the power of imposing additional taxes on the burghs royal, for the purpose of aiding the smaller or more indigent of the class in the erection of harbours, and other public works for the promotion of their commercial prosperity." The Convention sues and is sued in name of its agent. Through long practice the Lord Provost of Edinburgh presides over the meetings when these are held in Edinburgh, although he is not a member. He has a casting but no deliberative vote, unless he be one of the representatives of the burgh. When the Convention meets in other burghs, which it occasionally does, the commissioner of that burgh is appointed preses for the time, and he presides over the meetings. There is a roll of the burghs which regulates their precedence, but the Convention has repeatedly held that in absence of the Lord Provost of Edinburgh and the commissioner of the burgh in which the Convention may be assembled, that it has the right to select its chairman, irrespective of the precedence of the burghs. The subsidies granted by the Scottish Parliaments to the Court were allocated in slump on the burghs, and the Convention, as their corporate representative, was responsible for the whole sum. This slump sum was allocated on the burghs by the Convention in certain amounts, according to their common good and prosperity. These sums were, until 1835, paid over to the agent or Convention, who paid the full amount of the sum levied on the whole burghs to the Crown.

By the Acts 42 & 43 Vict. 1879, c. 27, and 58 Vict. c. 6, the Convention was empowered to admit parliamentary and police burghs in Scotland upon such terms as might be agreed upon. These burghs are represented in the Convention by commissioners and assessors, similarly to the royal burghs of Scotland. The Convention is thus now composed of representatives from all the burghs in Scotland which choose to elect such. The last Convention in 1896 consisted of 175 members and its preses.

The Convention has rendered considerable service to the inhabitants of the burghs in past times, and even of more recent date has rendered good service to the community. In particular, it was through its action and at its expense that a Bankruptcy Law was first obtained for Scotland, while in like manner it secured the establishment of the Board of Manufactures for the promotion and encouragement of Science and Art and Manufactures in Scotland, and, from the formation of that body until a comparatively recent date, paid the salaries of certain of its officials. In 1827, when there was no General Police Act for Scotland, it successfully promoted a Bill regulating matters of police in Scotland, and was largely instrumental in getting the Burgh Police Act of 1892 passed; while the Act 9 & 10 Vict. c. 7, abolishing the exclusive privileges of trade in burghs, was promoted by the Convention, and carried through at its expense. It took a very active part in the promoting and passing of the Roads and Bridges Act of 1878, and was the means of securing the commutation of the stent or land tax within burghs, which had been a great grievance for long. The recent creation of the Department of State for Scotland was greatly due to its persistent action.

The business of the Convention is transacted at an annual and special meetings of the representatives of the burghs. It has an annual committee, which meets as occasion requires throughout the year.

[See Ersk. book i. title 4. s. 23; Bankt. vol. ii. p. 579; Bell, *Prin.* s. 2172; *Report on Municipal Corporations*, 1835, p. 52; *Convention of Burghs* v. *Cuningham*, 5 Aug. 1842, Bell's App. 628; *Records of Convention.*]

Convention of Estates.—The term "convention," in the political sense, is applied to Parliament when convened otherwise than by the authority of the Crown. During the absence or incapacity of the sovereign, Parliament lacks one of its component elements (Crown, Lords, Commons), and, in a technical sense, its proceedings are unconstitutional; but as the real sovereignty resides in the two other branches of the Legislature, and ultimately in the electorate, it has never been doubted since the Revolution that a "Convention Parliament" may temporarily carry on the government during such an emergency. The chief English Conventions were those of the Restoration and the Revolution. The chief Scottish "Convention of Estates" was that summoned by the Prince of Orange in 1689, which declared that James II. had "forfeited his right to the crown," and which then drew up a Declaration of Rights, similar to that framed by the English Convention. It was then converted by an Act of its own into a Parliament, and sat for the rest of the reign.

[Hallam, *History of England*, etc.]

Conventional Obligations.—A conventional obligation is an obligation founded on consent, by which one is bound to give, do, or refrain from doing something, and which confers on him to whom the obligation is undertaken a right to exact its performance (Pothier, *Tr. des Oblig.* p. 2; Bell, *Prin.* 7). It is distinguished from a *natural* obligation, which is incumbent upon one merely by the law of nature, and not enforceable by action; and from a *civil* obligation, which may be sued upon in an action, but may be elided by an exception in equity, as in an action on an obligation extorted by force or fear (3 Ersk. 1. 10; 3 Ersk. *Prin.* 1. 2; 1 Bell, *Com.* 312). Lord Stair has distinguished three acts of the will precedent to a conventional obligation: desire, resolution, and engagement, but of the last only does the law take cognisance (1 Stair, i. 10. 2). Deliberate consent is essential to the perfect constitution of a conventional obligation, excluding on the one hand incapacity,—from nonage, disease, or imbecility,—and on the other, fraud, force, and fear (Bell, *Prin.* 10; 1 Bell, *Com.* 313. *sq.*). See CONTRACT; OBLIGATION; CONSENT.

Conversion.—See HERITABLE AND MOVEABLE.

Conveyancing.—See DEEDS, EXECUTION OF; ABSOLUTE DISPOSITION; ASSIGNATION; BOND; CHARTER; DISPOSITION; INFEFTMENT; SASINE; REGISTRATION; etc.

Convict.—A convict, in the strict sense of the term, is one who has been found guilty of a crime by the judgment of a competent Court. The word, however, in ordinary usage, signifies an offender who has been sentenced to undergo a term of penal servitude in a convict establishment.

The punishment of penal servitude is of comparatively recent origin. Prior to 1853, serious crimes might be punished by a sentence of transportation to penal settlements in the colonies. By an Act of that year (16 & 17 Vict. c. 99), the punishment of penal servitude was substituted in certain cases for that of transportation. An Act of 1857 (20 & 21 Vict. c. 3) repealed in part the Act of 1853, and provided (s. 2) that sentence of trans-

portation should be abolished, and that sentence of penal servitude should be substituted in its place.

Licences.—Convicts who have been well-behaved in prison are usually liberated, under a licence, before the term of penal servitude to which they were sentenced has expired. The Act of 1853 provides (s. 9) that it shall be lawful for Her Majesty, by an order in writing, under the hand and seal of one of Her Majesty's Principal Secretaries of State, to grant to any convict under sentence a licence to be at large in the United Kingdom and the Channel Isles, or in such part thereof respectively as in such licence shall be expressed, during such portion of his or her term of imprisonment, and upon such conditions, in all respects, as to Her Majesty shall seem fit; and it shall be lawful for Her Majesty to revoke or alter such licence by a like order at Her Majesty's pleasure. So long (s. 10) as such licence shall continue in force and unrevoked, such convict shall not be liable to be imprisoned by reason of his or her sentence, but shall be allowed to go or remain at large, according to the term of such licence. Provided always (s. 11) that if it shall please Her Majesty to revoke any such licence as aforesaid, it shall be lawful for one of Her Majesty's Principal Secretaries of State, by warrant under his hand and seal, to signify to any one of the police magistrates of the metropolis that such licence has been revoked, and to require such magistrate to issue his warrant, under his hand and seal, for the apprehension of the convict to whom such licence was granted; and such magistrate shall issue his warrant accordingly; and such warrant shall and may be executed by the constable to whom the same shall be delivered for that purpose, in any part of the United Kingdom or in the Channel Isles, and shall have the same force and effect in all the said places, as if the same had been originally issued or subsequently endorsed by a justice of the peace or magistrate, or other lawful authority having jurisdiction in the place where the same shall be executed. Such convict, when apprehended under such warrant, shall be brought, as soon as he conveniently may be, before the magistrate by whom the said warrant shall have been issued, or some other magistrate of the same Court, and such magistrate shall thereupon make out a warrant under his hand and seal for the recommitment of such convict to the prison from which he was released by virtue of the said licence, and such convict shall be so recommitted accordingly, and shall thereupon be remitted to his or her original sentence, and shall undergo the residue thereof as if no such licence had been granted.

The Penal Servitude Act of 1864 (27 & 28 Vict. c. 47) makes these provisions as to licences:—

Sec. 4. A licence may be in the form of Schedule (A) of the Act, and may be written, printed, or lithographed. If any holder of a licence granted in the form of Schedule (A) is convicted, either by the verdict of a jury or upon his own confession, of any offence for which he is indicted, his licence shall be forthwith forfeited by virtue of such conviction; or if any holder of a licence who shall be at large in the United Kingdom shall, unless prevented by illness or other unavoidable cause, fail to report himself personally, if in Great Britain, to the chief police station of the borough or police division, and if in Ireland, to the constabulary station of the locality to which he may go, within three days after his arrival therein, and, being a male, subsequently once in each month, at such time and place, in such manner, and to such person, as the chief officer of the constabulary force to which such station belongs shall appoint, or shall change his residence from one police district to another without having previously notified the same to the police or constabulary station to which he last reported himself, he

shall be deemed guilty of a misdemeanour, and may be summarily convicted thereof, and his licence shall be forthwith forfeited by virtue of such conviction, but he shall not be liable to any other punishment by virtue of such conviction.

Sec. 5. If any holder of a licence granted in the form of Schedule (A): (1) Fails to produce his licence when required to do so by any judge, justice of the peace, sheriff, sheriff-substitute, police or other magistrate before whom he may be brought, charged with any offence, or by any constable or officer of the police in whose custody he may be, and also fails to make any reasonable excuse why he does not produce the same; or (2) breaks any of the other conditions of his licence by an act that is not of itself punishable either upon indictment or upon summary conviction:—he shall be deemed guilty of an offence punishable summarily by imprisonment for any period not exceeding three months, with or without hard labour.

Sec. 6. Any constable or police officer may, without warrant, take into custody any holder of such a licence whom he may reasonably suspect of having committed any offence, or having broken any of the conditions of his licence, and may detain him in custody until he can be taken before a justice of the peace or other competent magistrate, and dealt with according to law.

Sec. 7. In Scotland, any offence under this Act punishable summarily may be prosecuted upon summary conviction at the instance of the procurator-fiscal before any sheriff or sheriff-substitute, or before any two justices of the county, or before the magistrates or any police magistrate of the burgh in which the offence is committed.

Sec. 8. Where the holder of a licence is summarily convicted of an offence, the convicting magistrate shall forward by post a certificate in the form given in Schedule (B), if in England or Scotland to one of Her Majesty's Principal Secretaries of State, if in Ireland, to the Lord-Lieutenant, and thereupon the licence of the said holder may be revoked by these officials.

Sec. 9. Where any licence granted in the form set forth in the said Schedule (A) is forfeited by a conviction of any indictable offence, or is revoked in pursuance of a summary conviction under this Act or any other Act of Parliament, the person whose licence is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his licence is forfeited or revoked, further undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his licence being granted, and shall, for the purpose of his undergoing such last-mentioned punishment, be removed from the prison of any county, borough, or place in which he may be confined, to any penal settlement by warrant under the hand and seal of any justice of the peace of the said county, borough, or place, and shall be liable to be there dealt with in all respects as if such term of penal servitude had formed part of his original sentence.

Sec. 10. It shall be lawful for Her Majesty, or for the Lord-Lieutenant of Ireland, whenever they shall respectively think fit, to grant from time to time to convicts under sentence of penal servitude, licences in any other form different from that set forth in Schedule (A) which they may respectively consider it expedient to adopt, and containing other and different conditions; and such last-mentioned licences shall be revocable at pleasure by the authority by which they are granted: but no holder of such last-mentioned licence shall be deemed guilty of an offence punishable upon

summary conviction merely by reason of the breach of the conditions of the said last-mentioned licences, or any of them.

The Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), contains the following provisions as to convicts' licences:—

Sec. 3. Any constable in any police district may, if authorised so to do in writing by the chief officer of police of that district, without warrant take into custody any convict who is the holder of a licence granted under the Penal Servitude Acts, if it appears to such constable that such convict is getting his livelihood by dishonest means, and may bring him before a Court of summary jurisdiction for adjudication. If it appears from the facts proved before such Court that there are reasonable grounds for believing that the convict so brought before it is getting his livelihood by dishonest means, such convict shall be deemed to be guilty of an offence against this Act, and his licence shall be forfeited.

Sec. 4. Where in any licence under the Penal Servitude Acts, any conditions different from or in addition to those contained in Schedule (A) of the Penal Servitude Act, 1864, are inserted, the holder of such licence, if he breaks any such conditions by an act that is not of itself punishable either upon indictment or upon summary conviction, shall be deemed guilty of an offence against this Act, and shall be liable to imprisonment for any period not exceeding three months, with or without hard labour.

A copy of any conditions annexed to any licence granted under the Penal Servitude Acts, other than the conditions contained in Schedule (A) of the Act of 1864, shall be laid before both Houses of Parliament within twenty-one days after the making thereof, if Parliament be then sitting, or if not, then within fourteen days after the commencement of the next session of Parliament.

Sec. 5. Every holder of a licence granted under the Penal Servitude Acts who is at large in Great Britian or Ireland shall notify the place of his residence to the chief officer of police of the district in which his residence is situated, and shall, whenever he changes such residence within the same police district, notify such change to the chief officer of police of that district, and whenever he changes his residence from one police district to another, shall notify such change of residence to the chief officer of police of the police district which he is leaving, and to the chief officer of police of the police district into which he goes to reside; moreover, every male holder of such a licence as aforesaid shall, once in each month, report himself at such time as may be prescribed by the chief officer of police of the district in which such holder may be, either to such chief officer himself or to such other person as that officer may direct, and such report may, according as such chief officer directs, require to be made personally or by letter. If any holder of a licence who is at large in Great Britain or Ireland remains in any place for forty-eight hours without notifying the place of his residence to the chief officer of police of the district in which such place is situated, or fails to comply with the requisitions of this section on the occasion of any change of residence, or with the requisitions of this section as to reporting himself once a month, he shall in every such case, unless he proves to the satisfaction of the Court before whom he is tried that he did his best to act in conformity with the law, be guilty of an offence against this Act, and, upon conviction thereof, his licence may, in the discretion of the Court, be forfeited; or if the term of penal servitude in respect of which his licence was granted has expired at the date of his conviction, it shall be lawful for the Court to sentence him to imprisonment, with or without hard labour, for a term not exceeding one year, or, if

the said term of penal servitude has not expired, but the remainder unexpired thereof is a lesser period than one year, then to sentence him to imprisonment, with or without hard labour, to commence at the expiration of the said term of penal servitude, for such a term as, together with the remainder unexpired of his said term of penal servitude, will not exceed one year.

Punishment of Refractory Convicts.—The Act of 1864 provides (s. 3) that one of Her Majesty's Principal Secretaries of State in Great Britain, and the Lord-Lieutenant or other Chief Governor in Ireland, may, by warrant under his hand and seal, empower any two or more justices of the peace, to be named in such warrant, acting for any county in which a prison for the reception of convicts under sentence of penal servitude is situate, to order from time to time the infliction of corporal punishment on any convict confined in such prison, for an offence committed by such convict in such prison, and against the discipline thereof; and any two or more justices of the peace thus empowered shall have the same power of adjudicating on such offences, and of ordering the infliction of such punishment, to be exercised under the same conditions as one of the directors of convict prisons would have and no greater.

See Penal Servitude; Prevention of Crimes.

Conviction.—A conviction of a criminal charge is reached when the jury returns a verdict of guilty, or when the judge reaches the conclusion that the panel's guilt has been established, either upon confession or by evidence. A conviction must always be recorded. The verdict of the jury is entered in the record and signed by the Clerk of Court, or, in capital cases, by the judge. Forms of conviction are appended to the Summary Procedure Act, 1864 (27 & 28 Vict. c. 53, Sched. (K)). These forms, however, are directory merely, and not imperative (*Scott*, 1866, 5 Irv. 278; *Kinnear*, 1868, 1 Coup. 56). But the forms should be followed as far as the special circumstances of the case will permit. If a complaint is brought under a particular Act which prescribes forms, the conviction should be in the statutory form (*Simpson*, 1892, 3 White, 170).

The conviction must be written out and signed before the prisoner is removed from the bar, unless the case is one in which proceedings in absence are authorised by Statute (*Gray*, 1858, 3 Irv. 29). In summary cases, the conviction must be signed by the judge. If two justices or magistrates try the case, the conviction must be signed by both (*Lock*, 1850, J. Shaw, 307; *Williamson*, 1858, 3 Irv. 295). Where a body of justices are exercising common-law powers, their preses may sign a conviction, if that is the usual custom (*Ranken*, 1836, 1 Swin. 44). When, however, the justices are exercising a statutory jurisdiction, all of them who hear the case, or at least a quorum, should sign the conviction (*Birrel*, 1860, 3 Irv. 556).

A conviction should state whether it proceeds on evidence or on the confession of the accused (*Scott*, 1857, 2 Irv. 745). It must also find the accused guilty or not guilty (*Yuill*, 1890, 2 White, 473). A conviction must be unambiguous, otherwise it may be declared void from uncertainty (*Binnie*, 1890, 2 White, 480). Either the complaint or the conviction must specifically set forth an offence at law (*Abbot*, 1882, 4 Coup. 614). If the complaint sets forth no offence at common law or by statute, and the conviction specifies the offence only by a reference to the complaint, it is bad (*Wemyss*, 1881, 4 Coup. 419).

The conviction must not be inconsistent with the complaint (*Downes*, 1882, 4 Coup. 567; *Markland*, 1891, 3 White, 21; *Donald*, 1892, 3 White, 274). Thus, if a complaint libels breach of a section of an Act of Parliament, the conviction is bad if it refers to the Act but not the section (*Graham*, 1888, 2 White, 96). Again, a general conviction following on an alternative complaint is bad (*M'Nab*, 1842, 1 Broun, 41; *Jones*, 1853, 1 Irv. 334; *Mains*, 1860, 3 Irv. 533; *Neilson*, 1870, 1 Coup. 476; *Banzie*, 1875, 3 Coup. 89; *Greig*, 1877, 3 Coup. 382; *Boyd*, 1879, 4 Coup. 239; *Charleson*, 1881, 4 Coup. 470; *Duncan*, 1888, 2 White, 104; see also *Arthur*, 1876, 3 Coup. 300, and *M'Giveran*, 1894, 1 Adam, 448).

A conviction following on an irrelevant or incompetent complaint or indictment is bad, and will be suspended (*Clark*, 1876, 3 Coup. 268; *M'Allister*, 1878, 4 Coup. 28). A jury's verdict in a criminal case cannot be reviewed on the merits. But a conviction following on a verdict may be reviewed on grounds which do not involve a reconsideration of the merits. Review in such a case is competent, for example, where the libel is irrelevant (*Anderson*, 1861, 4 Irv. 5; *Clendinnen*, 1875, 3 Coup. 171), or where there are questions as to the admission or rejection of evidence (*Burns*, 1856, 2 Irv. 571), or where the verdict itself is defective or incomplete (*Gray*, 1862, 4 Irv. 166; *Graham*, 1864, 4 Irv. 504; *Milne*, 1874, 2 Coup. 562).

See CONVICTION (PREVIOUS).

Conviction (Previous).—A previous conviction of a similar crime is regarded as an aggravation of that offence, and is to be taken into consideration in awarding the punishment of the second conviction. But a previous conviction, to be founded on, must be a proper legal conviction (*Grant*, 1889, 2 White, 261); and reached prior to the offence under trial (*Mitchell* or *Carr*, 1837, Bell, *Notes*, 32; *Graham*, 1842, 1 Broun, 445, and Bell, *Notes*, 32).

Prior to 1870, a previous conviction, if it was to be founded on in Scotland at common law, required to be a conviction of a Scottish tribunal. But by an Act of that year (33 & 34 Vict. c. 112, s. 18), it is enacted that a previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom, and this whether the conviction has been obtained before or after the passing of the Act. The Criminal Procedure Act of 1887 (50 & 51 Vict. c. 35) declares that this is the law as to the three classes of aggravation by previous conviction mentioned in that Statute (ss. 63, 64, 65), and afterwards referred to in this article.

In the form of indictment in use prior to 1887, previous convictions were set forth in the body of the libel. The Act of 1887 provides (s. 19) that it shall not thereafter be necessary to set forth in an indictment any previous conviction or productions that are to be used against an accused person, but it shall be sufficient to enter them in the list of productions to be used at the trial, every such conviction being therein described as a conviction applying to the person accused against whom it is to be used.

Prior to 1887, a previous conviction, in order to be used as an aggravation of a subsequent offence, required to be of a crime similar to that subsequently committed. Thus, prior to that year, a previous conviction of breach of trust and embezzlement could not be founded on as an aggravation of theft. This has been altered by the Act of 1887. By this Statute three classes of aggravations by previous conviction have been established, viz.: (1) crimes inferring dishonesty; (2) crimes inferring violence; (3) crimes

inferring indecency. By sec. 63 it is provided that extracts of previous convictions of crime inferring dishonesty may be lawfully put in evidence as aggravations of crimes inferring dishonesty or attempts to commit such crimes subsequently committed, and that any aggravation of the crime or attempt which such extract conviction bears to have been found proven, may be lawfully used in evidence to the like effect. By sec. 64 similar provisions are made as to crimes inferring violence, and by sec. 65 as to crimes inferring indecency.

The proof of extract convictions of crime and the mode of using them at the trial are dealt with by ss. 66 and 67 of the Act of 1887. It is provided by sec. 66 that an extract conviction of any crime committed in any part of the United Kingdom, bearing to be under the hand of the officer in use to give out such extract convictions, shall be received in evidence without being sworn to by witnesses. Such conviction shall be held to apply to the person accused, to whom notice is given in the list of productions that it is to be used against him, unless he shall give written notice to the procurator-fiscal of the district to the Court of which he is cited for the second diet, or to the Crown agent where he is cited to the High Court of Justiciary for the second diet, at least five clear days before the date fixed for the second diet, or any date to which such diet may be adjourned or postponed; or, where the person accused proposes to plead guilty at the first diet, then not less than two clear days before the first diet, that such extract conviction is not under the hand of the proper officer, or that it does not apply to such accused person, or of any other objection to its validity or admissibility. Where such notice is given, it shall be competent to prove by a witness or witnesses such previous conviction or any facts relevant to the admissibility of the same, although the name of any such witness be not included in the list served on the person accused. The person accused shall also be entitled to examine witnesses in regard thereto. An official of any prison in which such person accused may have been confined on such conviction, shall be a competent and sufficient witness to prove the application thereof to the person accused, although he may not have been present in Court at the trial to which the extract produced of such conviction relates.

It is provided by sec. 67 that previous convictions against a person accused shall not be laid before the jury, nor shall reference be made thereto in presence of the jury before the verdict is returned. Nothing contained in the Act of 1887 shall prevent the public prosecutor from laying before the jury evidence of such previous convictions, where, by the law existing prior to 1887, it was competent to lead evidence of such previous convictions as evidence *in causa* in support of the substantive charge, or where the person accused shall lead evidence to prove previous good character. It shall no longer be necessary for the jury to return a verdict finding whether previous convictions against the persons accused have been proved or not. Where any such conviction is admitted in evidence by the Court, either after a plea of guilty, or after a verdict of guilty, to any charge to which such previous conviction constitutes an aggravation, the Court shall have power to take such previous conviction into consideration in awarding punishment. Where any person is convicted of any crime, and also of any aggravation by previous conviction, the Clerk of the Court in which sentence is pronounced shall enter in the record of the trial a statement of the contents of any extract conviction that is put in evidence, setting forth the date, the place of trial, the Court, the nature of the crime, the aggravations accompanying it, if any, and the sentence

pronounced; and where such person is again accused of any offence, in regard to which such conviction may be competently used as an aggravation, a duly certified extract of the conviction, setting forth the particulars of previous conviction as above, shall be admissible and sufficient as evidence to prove against him all the previous convictions and aggravations therein set forth.

It will be noted that this section empowers the Court to take into consideration previous convictions in awarding punishment. At common law, however, a judge is entitled to do this, and a severer punishment is invariably imposed upon a person who has been previously convicted of a similar crime than is imposed upon one who has been convicted of a first offence. Certain Statutes, indeed, specifically enact severer penalties for a second or third conviction than for the first breach of their provisions. Thus the Night Poaching Act (9 Geo. IV. c. 69, ss. 10, 11) enacts that penalties of increasing severity shall follow on second and third convictions of night poaching. The Home-Drummond Act (9 Geo. IV. c. 58, s. 21) imposes penalties of increasing severity for second and third convictions of breach of publican's certificate. The Act regulating the coin (24 & 25 Vict. c. 99) provides for the severer punishment of a second conviction of a coining offence.

See AGGRAVATION OF CRIME; CONVICTION.

Conviction, Summary.—This term is employed to express both the oral judgment of the Court in a summary criminal prosecution and the document by which that judgment is reduced to writing. The conviction may be in writing or printed, or partly written and partly printed, on the same sheet of paper as the complaint, or on a separate sheet attached to it (27 & 28 Vict. c. 53, s. 17); and must be in the form provided by the Summary Jurisdiction (Scotland) Acts in all prosecutions under the provisions of those Acts (44 & 45 Vict. c. 33, s. 3). In prosecutions under the Tweed Fisheries Acts, and in police prosecutions under general or local Police Acts, the use of special forms is optional (*ib.*). This article is restricted to procedure under the Summary Jurisdiction Acts. See TWEED FISHERIES ACTS and POLICE PROSECUTION.

I. *GENERAL FORM.*—The Summary Procedure Act, 1864, provides several forms of conviction, which are amended by the Summary Jurisdiction (Scotland) Act, 1881 (27 & 28 Vict. c. 53, s. 18, and Sched. K; 44 & 45 Vict. c. 33, ss. 6, 8 (1), 9 (5), and Sched. B). Two examples are here shown. The first illustrates the form which may be employed when an Act of Parliament directs imprisonment in default of payment of a penalty, and appoints a particular application of the money:—

At Inverness, the eleventh day of August 1896.—The Sheriff-Substitute, in respect of the evidence adduced, convicts the said Peter Gow of the contravention charged, and therefore adjudges him to forfeit and pay the sum of one pound sterling of penalty; and in default of immediate payment thereof, decerns and adjudges the said Peter Gow to be imprisoned for the space of fourteen days from this date, unless the said sum shall be sooner paid; and thereafter to be set at liberty; and for that purpose grants warrant to officers of law to convey the said Peter Gow to the prison of Inverness, thereafter to be dealt with in due course of law; and further directs the proceeds of the sale of the five hares mentioned in the foregoing complaint, with the amount of the foresaid penalty, to be paid to the Treasurer of the County of Inverness.

C. D.

The next example illustrates the form which may be employed when a statutory penalty is recoverable by a process of summary execution:—

At Inverness, the first day of September 1896.—The Sheriff-Substitute, in respect of the judicial confession of the said William Angus, convicts the said William Angus of the contravention charged, and therefore adjudges him to forfeit and pay the sum of five pounds sterling of penalty; and also finds the said William Angus liable in one pound one shilling of expenses to the complainer; and ordains instant execution by arrestment, and also execution by poinding and imprisonment: Grants warrant to officers of Court to arrest all debts and sums of money owing to the said William Angus, and to poind his goods and effects, and to sell the same at the expiration of not less than forty-eight hours after such poinding: Appoints such poinding and sale to be carried out in the manner provided by the Summary Jurisdiction (Scotland) Act, 1881, section 8, subsection 2; and appoints a return or execution of such poinding and sale to be made within eight days after the date of sale, under certification of imprisonment for the period of one month in default of payment or recovery of the said sums, with the expenses of diligence, before the time allowed for such report.

C. D.

The conviction or judgment against the respondent may be in one or other of the forms provided by the Act of 1864, as amended by that of 1881, or as nearly as may be in such form, according to the nature and circumstances of the complaint (27 & 28 Vict. c. 53, s. 18). The forms may also be used for warrants of imprisonment or other warrants granted subsequent to conviction, and in any other ulterior proceedings enjoined by the Act of Parliament founded upon (*ib.* s. 20). They are directed to be used as follows:—When the respondent is convicted of an offence at common law—*Form* No. 1; and when he is convicted of a contravention of an Act of Parliament, one or other of *Forms* Nos. 2 to 6, according to the statutory punishment or penalty; thus: (*a*) imprisonment—No. 2; (*b*) imprisonment or fine, in discretion of Court—Nos. 3 to 6, as may be in accordance with the Act contravened; (*c*) penalty, with imprisonment in default of payment—No. 3; (*d*) penalty, recoverable by poinding or distress and sale, or other process of execution by sale, with imprisonment in default of payment or recovery—No. 4; (*e*) penalty, recoverable by similar process, and imprisonment also authorised and not limited to default of recovery by execution—Nos. 4 or 5; (*f*) penalty, recoverable by action, civil process or diligence, or by arrestment, poinding or distress and sale, and imprisonment, or by a combination of those forms of diligence—No 6, so far as applicable, subject to the provisions of the Act of 1881. When the respondent is convicted under a Statute which authorises the Court to order him to do some act other than the payment of money under pain of imprisonment —*Form* No. 7 is used; and when he is acquitted—*Form* No. 8 is used (*ib.* s. 18, and Sched. K). The forms are directory and not imperative (*Kinnear, etc.*, 1868, 1 Coup. 56).

II. *Constituent Parts.*—1. *Place and Date.*—The conviction must show the true date upon which judgment was pronounced (*M'Allister*, 1869, 1 Coup. 302).

2. *Judge.*—The official title of the judge who pronounced judgment is set forth, but not his name (*Carruthers*, 1867, 5 Irv. 398).

3. *Grounds.*—The conviction must state the grounds in respect of which it proceeded, *e.g.* the respondent's judicial confession of guilt, or the evidence adduced, but not both (*M'Donald*, 1844, 6 D. 1161; *Scott*, 1857, 2 Irv. 745; *Gray*, 1858, 3 Irv. 29; *Cochran*, 1882, 5 Coup. 169; *Sharp*, 1892, 3 White, 154).

4. *Conviction.*—It is essential that the judgment shall expressly bear to what extent the Court has found the respondent guilty (27 & 28 Vict. c.

53, Sched. K; *Muirhead*, 1890, 2 White, 473; *Sharp*, 1892, 3 White, 154). When there are several respondents, any one or more of them may be found guilty (*Fitzsimmons*, 1861, 23 D. 1301); but when more than one are convicted and the extent of guilt differs, the guilt of each must be distinguished (*Galbraith*, 1895, 2 Adam, 4). It must be possible to clearly ascertain from the terms of the conviction, the precise offence of which the respondent is found guilty (*Graham*, 1888, 2 White, 96). That offence must be either the whole or part of the charge, or an offence legally included in the charge, *e.g.* an alternative in terms of the Criminal Procedure (Scotland) Act, 1887, ss. 59 to 62. The conviction must not go beyond the offence charged in the complaint or created by the Statute contravened (*Donald*, 1892, 3 White, 274; *Foley*, 1893, 3 White, 476). If the offence is particularly described in the conviction, the description must be relevant (*Smith*, 1856, 2 Irv. 402; *Craig*, 1865, 5 Irv. 206). When the complaint sets forth a charge, or *cumulative* charges, by a description which contains no proper alternatives, and the respondent is found guilty of the *whole*, the conviction simply finds him guilty of the "crime charged," or "contravention charged," as the case may be, using the plural when necessary. When the complaint sets forth two or more *cumulative* charges, and the respondent is convicted of *less than the whole*, the conviction must specify the portion of which he is found guilty. When the complaint sets forth two or more *alternative* charges, the conviction must distinguish the charge or charges of which the respondent is found guilty (*Mains, etc.*, 1860, 3 Irv. 533; *Duncan*, 1888, 2 White, 104). When the complaint sets forth a charge or charges by a description which contains proper alternatives (*e.g.* that the crime was committed by one or other of alternative persons, or on one or other of alternative dates, or at one or other of alternative places, or in one or other of alternative modes, unless, in the last case, a Statute creates a single offence which it describes by alternative modes of commission), the conviction must specify the particular alternative which was admitted, or held to be proved. A general conviction of guilty of "the crime charged" is bad, if it follows upon a complaint which contains alternative charges, or proper alternatives in the statement of the charge; but alternatives which are merely descriptive or explanatory are not deemed proper alternatives (*Macnab*, 1842, 1 Broun, 41; *Jones, etc.*, 1853, 1 Irv. 334; *Mains, etc.*, 1860, 3 Irv. 533; *Bruce*, 1861, 24 D. 184; *Duncan*, 1864, 4 Irv. 474; *Scott*, 1865, 5 Irv. 86; *M'Dade*, 1868, 1 Coup. 67; *De Banzie*, 1875, 3 Coup. 89; *Arthur*, 1876, 3 Coup. 300; *Boyd*, 1879, 4 Coup. 239; *James*, 1880, 4 Coup. 321; *Charleson*, 1881, 4 Coup. 470; *Downes, etc.*, 1882, 4 Coup. 567; *Murray*, 1883, 5 Coup. 215; *Hendry*, 1883, 5 Coup. 278; *O'Neills*, 1883, 5 Coup. 305; *Bell*, 1883, 5 Coup. 312; *Reaney*, 1883, 5 Coup. 367; *Macnaughton*, 1884, 5 Coup. 509; *Walker, etc.*, 1885, 5 Coup. 595; *M'Gregor*, 1886, 1 White, 211; *Shaw*, 1886, 1 White, 270; *Maxwell*, 1889, 2 White, 176; *M'Giveran*, 1894, 1 Adam, 448; *Galbraith*, 1895, 2 Adam, 4; *Teesdale*, 1896, 2 Adam, 137).

5. *Sentence.*—The punishment imposed as the result of the finding of guilt must be stated fully, accurately, and unambiguously (*Grant*, 1855, 2 Irv. 277). Material vitiation by erasure or alteration is fatal to the conviction (*Rogers*, 1847, Ark. 393; *M'Allister*, 1869, 1 Coup. 302; *Clarkson*, 1871, 2 Coup. 125; *Riddell*, 1881, 4 Coup. 397); but trivial errors are disregarded (*Henry*, 1846, Ark. 105; *Gallie, etc.*, 1883, 5 Coup. 365). A slight modification after signature, for the purpose of securing greater clearness, has been permitted (*M'Giveran*, 1894, 1 Adam, 448). Where more than one person is convicted of the same crime, the punishment imposed upon each should be stated separately, or so as to be capable of separation

(*Macdonell, etc.*, 1868, 1 Coup. 9). In passing sentence, the Court must, subject to the provisions aftermentioned, keep within its general powers of punishment, or within any special powers conferred by the Act of Parliament contravened (*Gerrond*, 1839, 2 Swin. 390; *Ferguson*, 1862, 4 Irv. 196; *Robertson*, 1893, 1 S. L. T. No. 233; *Moffat*, 1896, 2 Adam, 57). The following are the principal varieties of sentence awarded in prosecutions under the Summary Jurisdiction Acts:—(*a*) *Imprisonment* with or without hard labour. A direction for hard labour may, if otherwise competent, be added to the warrant of imprisonment in the conviction, or consequent thereon (27 & 28 Vict. c. 53, s. 18). If the respondent is, at the date of issuing warrant for his imprisonment pursuant to a conviction or judgment, undergoing imprisonment for a specified period upon a previous conviction or order, the Court may insert an order in the last conviction making the imprisonment under it commence at the expiration of the former term (*ib.* s. 23). When imprisonment is imposed by an Act of Parliament, the Court may substitute for it a fine not exceeding £25, or reduce the amount of imprisonment, and, notwithstanding any enactment to the contrary, impose imprisonment without hard labour; but these powers do not extend to proceedings taken under Acts relating to the regular or auxiliary forces (44 & 45 Vict. c. 33, s. 6 (a)). (*b*) *Fine or Penalty, and Imprisonment* in default of payment. A "penalty" under the Summary Jurisdiction Acts means a sum of money which may, by the authority of an Act of Parliament, be recovered from any person in respect of the contravention of a statutory requirement or prohibition, or be recovered as a penalty or forfeiture (27 & 28 Vict. c. 53, s. 2). The conviction must specify a period at the expiry of which the person sentenced shall be discharged from prison although he has not paid the fine or penalty (9 Geo. IV. c. 29, s. 21). The amount of fine is limited in common-law crimes by the general powers of the Court (44 & 45 Vict. c. 33, s. 6 (c)); and in statutory charges, by the provisions of the Act contravened, subject to modification. When the respondent is convicted of more than one statutory contravention, each of which renders him liable to a penalty, it is advisable to award for each a separate sum and alternative imprisonment; but this does not appear to be essential, since the High Court has sustained a conviction of two offences with a *eumulo* penalty (*Prentice*, 1883, 5 Coup. 210). When the Act of Parliament contravened allows a certain number of days for payment of the penalty, the imprisonment in the conviction must not be ordered to begin until after such period has expired (*M'Donald*, 1864, 2 M. 407; *Rhodes*, 1870, 1 Coup. 469; *Ritchie*, 1884, 5 Coup. 374). The conviction ought to allocate or apply the penalty as directed by the Act contravened (*Lamond*, 1860, 22 D. 718; *M'Callum*, 1870, 1 Coup. 486; *Galt*, 1873, 2 Coup. 470; *M'Callum*, 1896, 4 S. L. T. No. 208). When an Act imposes a pecuniary penalty, but gives no direction as to its recovery, the more humane, and apparently the proper, course is to award a term of imprisonment in default of payment (*Murray*, 1872, 2 Coup. 284; *Dingwall*, 1896, 2 Adam, 80). The period of imprisonment awarded in default of payment of a fine or penalty, whether for a common-law crime or a statutory contravention, must be fixed according to the amount adjudged to be paid, as follows:—Amount not exceeding 10s., imprisonment not to exceed seven days; exceeding 10s., but not £1, fourteen days; exceeding £1, but not £5, one month; exceeding £5, but not £20, two months; exceeding £20, three months (44 & 45 Vict. c. 33, s. 6 (b); *Gray*, 1889, 2 White, 290). In Revenue or Customs prosecutions, if the sum adjudged exceeds £50, imprisonment in default of payment or recovery by distress may exceed three, but not six, months (*ib.* s. 11). In a

statutory charge, the Court may reduce the statutory amount of penalty or fine, and dispense with an obligation or surety to keep the peace or observe other conditions; but it cannot reduce the fine when the Statute imposing it gives effect to the minimum amount of penalty stipulated for in a treaty, convention, or agreement with a foreign State, and it cannot mitigate the punishment in proceedings taken under an Act relating to any of Her Majesty's regular or auxiliary forces (44 & 45 Vict. c. 33, s. 6 (a)). The Court, in adjudging a sum to be paid, may allow time for payment, direct payment to be made by instalments, or require security to be found for the payment of the instalments (*ib.* s. 6 (c)). (*c*) *Penalty Recoverable by Diligence, e.g.* arrestment, or poinding, or distress and sale. In all proceedings under the Summary Jurisdiction Acts, where a warrant of poinding and sale is competent, a warrant of imprisonment in default of the recovery of sufficient goods is likewise competent, the term of imprisonment being specified in the warrant, and regulated by the amount adjudged to be paid, but not exceeding three months (*ib.* ss. 6 and 8 (1)). If a statutory penalty is recoverable by poinding or distress and sale, arrestment or other summary process of execution and imprisonment in default of payment or recovery, the judgment, as a general rule, must not order the immediate imprisonment of the respondent in place of authorising execution by summary process (*Murray*, 1872, 2 Coup. 284; *Simpson*, 1892, 3 White, 167: but if it appears, at the hearing of the case, that the issuing of a warrant for execution by summary process would be inexpedient, the Court may in the conviction declare such inexpediency, and award immediate imprisonment in default of payment (27 & 28 Vict. c. 53, s. 19, and Sched. K, No. 6; 44 & 45 Vict. c. 33, s. 8 (1); *Holland*, 1867, 5 Irv. 561; *Murray*, 1872, 2 Coup. 284). (*d*) *Admonition.* In charges of petty offences at common law, the Court can dismiss the respondent with an admonition. This course is not generally permissible in contraventions of Statutes which impose pecuniary penalties; and for these, in the absence of express authority,—*e.g.* Burgh Police (Scotland) Act, 1892, s. 483,—a sum of money must be exacted, however small (*Gardner*, 1865, 5 Irv. 13; *Downie, etc.*, 1893, 1 Adam, 80). (*e*) *Caution* for good behaviour or to keep the peace for a specified period, with alternative imprisonment according to the amount for which security is to be found (44 & 45 Vict. c. 33, s. 6). (*f*) *Forfeiture* of nets, goods, etc., if authorised by the Act of Parliament contravened (*ib.* s. 3). (*g*) *Condemnation* of goods seized under the Revenue or Customs Acts (*ib.* s. 11). (*h*) *Finding or Declaration* in terms of the Act contravened (27 & 28 Vict. c. 53, s. 18). (*i*) *Order ad factum præstandum*, if required by that Act (*ib.* s. 18 (7)). (*j*) *Probation* of good conduct (see FIRST OFFENDERS ACT). (*k*) *Private Whipping* of boys; and (*l*) *Detention* in an Industrial or Reformatory School.

6. *Award of Expenses.*—In complaints for the prosecution of a crime or offence at common law, no expenses are, as a rule, awarded to either party. In a complaint instituted under the Summary Jurisdiction Acts for the recovery of a penalty (see 5 (*b*), *supra*), expenses cannot be awarded to or against a public prosecutor unless the Statute under which the prosecution is brought authorises such award (27 & 28 Vict. c. 53, s. 22): but if such Statute authorises an award of expenses to him, the Court may also award expenses against him (*ib.*; *Ross*, 1869, 1 Coup. 336; *Walker*, 1873, 2 Coup. 460); while, in a complaint at the instance of a private complainer, the Court may, if it think fit, award expenses to the successful party (*ib.*). In every complaint for the recovery of a penalty, expenses, if otherwise competent, may be awarded though not prayed for (*ib.*). If expenses are

awarded, the amount must be stated in the judgment at the time of pronouncing it, and not at any subsequent time (*ib.*; 44 & 45 Vict. c. 33, s. 5). They are recovered as if they formed part of the penalty, and the same diligence follows in default of payment (*ib.*). The costs and expenses are regulated by the table of fees in Schedule A annexed to the Act of 1881 (*ib.* s. 4). When a finding of expenses is competent, the Court may find such sum to be due in name of expenses as it considers reasonable; but the total expenses decerned for against *each* respondent must not exceed £3 when the penalties imposed upon him do not exceed £12; but where the penalties do not exceed £12, and it appears to the Court that the reasonable expenses of the complainer's witnesses, together with the other expenses, exceed the sums allowed by the Act, the Court may direct the expenses of such witnesses to be paid, in whole or in part, out of the penalty (*ib.* s. 4; *Tough, etc.*, 1886, 1 White, 79; *Stewart*, 1891, 2 White, 627). This statutory limitation does not apply to an award of expenses against the complainer. The respondent cannot be ordered to pay the cost of diligence for recovery of a penalty under an Act which does not authorise recovery by diligence (*Moffat*, 1896, 2 Adam, 57).

7. *Executorial Matter.*—The warrants necessary for carrying out the sentence are embodied in the conviction. When the sentence has been properly written out and announced in open Court, the executorial matter may be completed within a reasonable time thereafter (*Hume*, 1846, Ark. 88; *Mackenzie*, 1889, 2 White, 253). If the respondent is absent when a judgment awarding imprisonment is pronounced, or if the imprisonment is not to begin till a later date, a warrant to apprehend and detain him is added to the conviction, otherwise such a warrant is unnecessary (*Kinnear, etc.*, 1868, 1 Coup. 56).

III. *Authentication.*—The conviction is signed by the judge who tried the case and gave judgment: and where there are more than one judge (*e.g.* in the Justice of Peace Court), it is signed by such number of justices, having jurisdiction in the matter, present at the hearing, and concurring in the result thereof, as may be required by the Act contravened (27 & 28 Vict. c. 53, s. 2 (1); *Wilson*, 1844, 2 Broun, 231; *Somerville*, 1844, 6 D. 1205; *Finlayson*, 1847, 9 D. 701). In the absence of statutory provision, at least two justices must sign (*Lock*, 1850, J. Shaw, 307; *Birrell*, 1860, 3 Irv. 556; *Leishman*, 1877, 3 Coup. 482). A Sheriff, magistrate, or justice may sign a conviction, judgment, warrant, or interlocutor outside his jurisdiction, provided the evidence and other procedure necessary to support the same shall have been had before him within such jurisdiction (27 & 28 Vict. c. 53, s. 13). See Criminal Prosecution (Summary).

Convoy.—See Marine Insurance.

Co-obligant.—Where two or more persons are debtors in one obligation, each may be bound to give full implement, or merely to contribute a proportional share. In the former case, liability is said to be *in solidum*; in the latter, *pro rata* (*parte*). There is a presumption that the liability is *pro rata*; but this may be rebutted (1) by the nature of the prestation; (2) by the relation of the obligants *inter se*, or to the creditor; (3) by the constitution of the debt; or (4) by express agreement.

(1) The obligation may consist in delivery of a specific corpus, or it

may be *in faciendo* or *in non faciendo*. If it cannot be performed in part, each obligant is bound for the whole. Even although, through non-performance, the debt resolves into a claim of damages, the nature of its incidence is not changed (*Grott*, 1672, M. 14631; *Darlington*, 1836, 15 S. 197). But where there is an alternative debt, one divisible and the other not, and the divisible is to take effect in the event of the indivisible not being fulfilled, its implement can only be required *pro rata* (*Denniston*, 1630, M. 14630; M'Laren's Bell's *Com.* i. 362, note; Bell, *Prin.* s. 58, note).

(2) The following persons are liable *in solidum* without any express agreement to that effect, viz.: Partners for a partnership debt, joint adventurers, joint purchasers, and generally all who, by entering into any transaction or series of transactions, come into a relation of *socii* to each other (*Carnegie*, 1672, M. 14671; *The Anna*, 1680, M. 14672; *Mushet*, 1710, M. 14636; *M'Girran*, 1725, M. 14672; *Reid*, 1856, 19 D. 265). But the mere fact of becoming a member of a provisional committee infers no such relation of partnership (*Bright*, 1851, 3 H. of L. Ca. 341; *M'Ewan*, 1857, 2 Macq. 499). Trustees are liable *in solidum* for engagements entered into on behalf of the trust estate (*Commercial Bank of Scotland*, 1841, 3 D. 939; *Oswald's Trs.*, 1879, 6 R. 461, per L. P. Inglis). Where one co-obligant, though bound as principal debtor, is really cautioner for his co-debtor, he incurs the full liability of a cautioner (*Grant*, 1721, M. 14637). Joint mandants, in the absence of a stipulation to the contrary, are bound *in solidum* to their mandatory, but actual employment by each must be clearly proved (*Walker*, 1803, 13 F. C. 271, M. App. Solidum, No. 1; *Wilsons, Petrs.*, 10 July 1813, F. C.; *Murdoch*, 1815, 18 F. C. 216; *Ramsay*, 1840, 2 D. 1336; *Webster*, 1852, 14 D. 932; *M'Ewan, supra*). Joint delinquents are each liable *in solidum* to make reparation to the injured party (*Smith*, 1800, Hume, 605; *Leslie's Reprs.*, 1851, 14 D. 213; *Western Bank*, 1862, 24 D. 859). Joint pursuers in an action are similarly liable for expenses found due to the defender (*C. Sutherland*, 1776, 5 B. S. 439). And tutors and curators are under a solidary obligation to the pupil or minor (*Guthrie*, 1630, M. 14640; *Davidson*, 1634, M. 506; *Burnet*, 1675, M. 14696; *Sinclair*, 1686, M. 14696).

(3) By the usage of trade, debtors in a bill or promissory note are each bound for the full sum.

(4) *Pro rata* liability is usually expressed by such words as "jointly," "conjunctly," "each for his own share" (*Campbell*, 1724, M. 14626: *Alexander*, 1827, 6 S. 150); whereas such expressions as "conjunctly and severally," "as full debtors," "as co-principals and full debtors," import a liability in each for the whole (*Cloverhill*, 1631, M. 14623; *Dunbar*, 1665, M. 3584; *Cleghorn*, 1707, M. 14624; *Commercial Bank, supra*). But the mere use of such a word as "conjunctly" is not conclusive proof that the liability is only *pro rata* if a solidary liability can be set up (*Boyd*, 1649, 1 B. S. 403; *Wallace*, 1671, 1 B. S. 635; *Campbell, supra*; *Sloan*, 1751, M. 14630). And similarly, the words "conjunctly and severally" have been overruled by the subsequent expression of the deed (*Farquhar*, 1638, M. 2282). Lessees and feuars have sometimes bound themselves, their heirs and successors, conjunctly and severally. In such cases, they may undertake or lay upon others a very serious burden. Thus a feuar has made himself liable for payment of the feu-duty after the subject had passed to a singular successor (*Dundee Police Commissioners*, 1884, 11 R. 586); and the representatives of a joint lessee have been found liable for the stipulated rent after the whole interest in the subject had passed to

his co-obligant (*Burns*, 1887, 14 R. (H. L.) 20). But where three feuars of a coalfield bound themselves jointly and severally to pay all damages caused through working the coal, a singular successor in the subject was held only liable for the damage caused by himself, not by his predecessors (*Baird's Trs.*, 1851, 13 D. 982).

See CONJUNCTLY AND SEVERALLY.

Copies and Extracts.—The admissibility of official copies and of extracts from official records is an exception to the general rule which requires the best evidence (see BEST EVIDENCE; BOOKS), and rests on the ground that they are prepared under the care of, and are authenticated by, the proper public officials.

1. *In the Case of Judicial Records.*—Observe that the record must be that of a Court recognised by law (*Mathers*, 1849, 12 D. 433). In criminal Courts, extracts by the respective Clerks of Court are full proof of previous convictions. It is necessary to prove their validity or applicability, only if challenged (50 & 51 Vict. c. 35, ss. 66, 67). In civil cases, an extract decree, if in the proper form and authenticated by the proper officer (*M'Dougall*, 1623, M. 12180; see also *Clark*, 1816, 1 Murray, 163), is probative; and, if regular *ex facie*, it is presumed that it is accurate and signed as law requires (Stair, iv. 42. 10; Ersk. iv. 2. 6). It may be challenged, however, on specific grounds, *e.g.*, that it is disconform to its warrant (Stair, iv. 1. 45; *ib.* 42. 10; *Dingwall*, 1825, 4 S. 246; *Swan*, 1829, 7 S. 775), or that it has been issued prematurely (*Grindlay*, 1829, 7 S. 493; *ib.* 1830, 8 S. 642; *Badger*, 1844, 17 Sc. Jur. 53; cf. *Martin*, 1685, 2 Bro. Supp. 69). By Statute, a certified copy of an interlocutor granting commission or diligence is made equivalent to a formal extract (13 & 14 Vict. c. 36, s. 25); and a certified copy of an interlocutor fixing the trial is made the warrant for citing witnesses and havers (*ib.* s. 43. So, too, in the Sheriff Court, 16 & 17 Vict. c. 80, s. 11). The Bankruptcy Act, 1856, provides that a certified copy of the act and warrant in favour of the trustee is to be received as *primâ facie* evidence of his title to sue for and recover debts due to the bankrupt (s. 73); and that "all deliverances . . . purporting to be signed by the Lord Ordinary, or by any of the judges of the Court of Session, or by the Sheriff, as well as all extracts or copies thereof, or from the books of the Court of Session or the Sheriff Court, purporting to be signed or certified by any Clerk of Court, or extracts from or copies of registers purporting to be made by the keeper thereof, or extractor, shall be judicially noticed by all Courts and judges in England, Ireland, and Her Majesty's other dominions, and shall be received as *primâ facie* evidence, without the necessity of proving their authenticity or correctness, or the signatures appended, or the official character of the persons signing, and shall be sufficient warrants for all diligence and execution by law competent" (s. 174). A certified copy of letters of tutory or curatory is to be held as forming the basis of a summary process (12 & 13 Vict. c. 51, s. 28). In appeals to the House of Lords, certified copies of prints and interlocutors are admissible in the same manner as were extracts under the former practice (50 Geo. III. c. 112, s. 11; 1 & 2 Geo IV. c. 38, s. 24; 6 Geo. IV. c. 120, s. 26). On the petition, to the Inner House, of one of the parties to a cause, the Court directed the principal clerk to certify a copy of the proceedings for production in a foreign Court in a similar action between the same parties (*Walter*, 1889, 16 R. 926). As to the method of obtaining certified copies of Court of Session proceedings,

and full extracts or copies in Sheriff Court proceedings, see A. S. 22 Jan. 1876, s. 8, and A. S. 27 Jan. 1830, s. 4.

If it be shown that an extract or an exemplification (as it is frequently termed) of a foreign judgment is an authentic copy (see *Dishrow*, 1852, 15 D. 123), and that such a copy would be receivable as evidence in the country where the judgment was pronounced, it will be equally receivable here (Hume, ii. 355; *Sinclair*, 1768, M. 4542; revd. 1771, 2 Pat. App. 253; *Frizell*, 1860, 22 D. 1176; *Whitehead*, 1861, 23 D. 772; *Stiven*, 1868, 6 M. 370; *Maitland*, 1885, 12 R. 899; Dickson, ss. 1319–21).

As to the form and essentials of the extract, see EXTRACT.

2. *In the Case of Registers of Private Writings.*—The registration of a deed in the books of a Court proceeds in theory upon the order of a judge. The deed itself is the warrant of the decree; and, just as in the ordinary case of extract decrees, the extract of the deed, so recorded, is probative no less than is the principal; save, indeed, where the latter is offered to be improven (Dickson, ss. 1136, 1299). It seems that, at common law, in accordance with the rule which requires the best evidence, the extract is not equivalent to the principal, when the latter is given back to the ingiver (Tait, 192). Extracts from certain registers are, however, made admissible by the Statute, although the original writs are not retained therein, *e.g.* extracts from the Register of Sasines (1617, c. 16. See 31 & 32 Vict. c. 64, s. 12, which provides that a writ registered in the Register of Sasines, with an addition in the warrant specifying that the writ is to be registered for preservation, or for preservation and execution, as well as for publication, shall not be redelivered to the ingiver. By 31 & 32 Vict. c. 101, s. 142, extracts of deeds, warrants of registration, and instruments recorded in the Register of Sasines, shall make faith as the originals would have done, save where the latter shall be offered to be improven); from the Register of Inhibitions and Interdictions (1581, c. 119 (1); see 31 & 32 Vict. c. 64, s. 16); from the Register of Probative Writs (1698, c. 4. These writs are no longer given back to the ingivers; 31 & 32 Vict. c. 34, s. 2); and, *semble*, from the Register of Summons and Instruments of Interruption of Prescription (1696, c. 19; see 31 & 32 Vict. c. 64, s. 15, and Tait, 194). The Act 31 & 32 Vict. c. 34, s. 1, provides that writs given in to be registered in the Books of Council and Session are not to be given out, except with the Court's authority (see *Leigh-Bennett*, 1893, 20 R. 787). Certified extracts of writs from the Register of the Great Seal, of which the fact and date of sealing have been duly recorded (49 Geo. III. c. 42, s. 16. As to charters from the Crown and Prince prior to 1809, the date of the Act, see Ersk. iv. 1. 22), and certified extracts from the Register of Crown Writs (31 & 32 Vict. c. 101, s. 87), are made probative, except in improbations.

While nothing will induce the Court to order a public register to be sent out of the country (*Kennedy*, 1880, 7 R. 1129, and cases there cited. *Contra E. of Euston*, 1883, 11 R. 235), it may, on full consideration of the circumstances, and on conditions, permit recorded documents to be taken out of its jurisdiction. In several cases, one of the conditions imposed was that an extract of the deed, duly authenticated, should be lodged in its stead (*Dunlop*, 1861, 24 D. 107; *Macdonald*, 1877, 5 R. 44; see *Leigh-Bennett*, *ut supra*).

Extracts, where the original documents are in the custody of the Lord Clerk-Register, are sufficient to meet the requirements of A. S. 19 Feb. 1841, s. 19, as to the production of documents (*Maclean*, 1861, 23 D. 1262).

As to the competency of extracts to satisfy production in actions of reduction-improbation, see REDUCTION.

3. *Certified and Examined Copies of Writings in Official Records or Custody* are in many cases made evidence by Statute (see Dickson, ss. 1313–18. As to England, see 14 & 15 Vict. c. 99, and Taylor, ss. 1599 *sqq.*). In the absence of such enactment, the genuiness and accuracy of the copy, if it be admissible on one or other of the recognised grounds (see BEST EVIDENCE: BOOKS), must be proved by a witness who has compared it with the original (*Dunbar*, 1820, 2 Bli. 351; *Kay*, 1832, 10 S. 831); *e.g.* a copy of the *Rotuli Scotiæ* must be so proved (*Crawford and Lindsay Peerage*, 2 H. L. 534, 547).

See below as to certified copies from the books of a foreign notary.

4. *Notarial Copies of Documents*, unless made evidence by Statute, are excluded, under the rule which requires the best evidence. But a certified copy from the books of a foreign notary has been admitted, where, according to the *lex loci contractus*, the deed itself was retained in his register (*Lamington*, 1627, M. 4443: *Davidsons*, 1682, M. 4444. Cf. *Lady Boghall*, 1688, 3 Bro. Supp. 669. See BEST EVIDENCE).

5. *Copies of Acts of Parliament.*—Public Statutes (see STATUTE) require no proof. In case, however, of any question as to their terms, these may be proved by copies bearing to be printed by the Queen's Printers (41 Geo. III. c. 90, s. 9). If the accuracy of the copy be impugned, the true reading may be proved by persons who have compared it with the Parliament Roll (Dickson, s. 1106; Taylor, s. 1523). The Legislature has enacted that every Act passed after the year 1850 shall be a public Act, and shall be judicially noticed as such, unless the contrary is expressly provided by the Act (52 & 53 Vict. c. 63, s. 9). A local and personal, or private, Act passed before that date, and containing no clause declaring it public, or passed after that date, and containing a clause declaring it not to be public, must in strictness be proved by a copy sworn to have been collated with the Parliament Roll (Dickson, s. 1105; Taylor, *ib.*; Bell, *Prin.* s. 2208).

[Dickson, *Evidence*, 1106, 1285–1323; Kirkpatrick, *Digest*, ss. 80–3, 117 *et seq.*]

See BEST EVIDENCE; REGISTRATION OF BIRTHS, ETC.; REGISTRY OF SHIPS; TRANSUMPT.

Copyright (Literary and Artistic).—The word copyright is somewhat loosely used by legal authorities to comprehend two distinct kinds of rights: (1) the right of property which an author or composer has in an unpublished production; (2) the exclusive privilege, after publication, of multiplying copies of the same. Strictly speaking, copyright should only include the latter; but the two kinds of rights are so closely connected that it is convenient to treat them together.

It was only after the invention of printing and engraving that questions of copyright arose. There is no trace of them in the Roman law. It concerned itself solely with the property in the parchment or tablet upon which anything was written or painted (*Inst.* ii. 1. 33 and 34).

Copyright is a right difficult to grasp and troublesome to define. Lawyers have differed greatly as to its nature, and whether it exists at all at common law. The result is that, although there may exist some right, the common law has been unable to define it, and copyright, for all practical purposes, is the creature of Statute (see Bell, *Com.* i. 108, 109; opinion of Ld. Gifford in *Tennyson*, 1871, 43 Sc. Jur. 278).

I. Property in Unpublished Works.

There can be no doubt of the absolute right of property in, and the uncontrolled right of disposal of, an author's unpublished compositions. So long as the productions of his brain remain undisclosed to the world, the absolute right of disposal remains in the author. He is entitled to the full control of them up to the moment of publication (Bell, *Com.* i. 116; *Jefferys*, 1854, 4 H. L. Rep. 962; *Caird*, 1885, 13 R. 23, opinion of L. P. Inglis, at p. 33). The creditors of an author or composer cannot compel him to publish or reproduce for their benefit (Bell, *Com.* i. 119). The absolute right of an author extends to his representatives or assignees (*Duke of Queensberry*, 1758, 2 Eden, 329).

In England, the right of an author to an injunction prohibiting the publication of his unpublished works is based solely on his right of property (Copinger, p. 47; Bell, *Com.* i. 118; *Southey*, 1817, 2 Mer. 435; *Prince Albert*, 1849, 18 L. J. (N. S.) Ch. 120), unless, where there is no right of property, the publication can be shown to be a breach of trust or a breach of contract (Bell, *Com.* i. 117; Copinger, p. 50; *Morison*, 1851, 9 Hare, 241; *Tuck*, 1887, 19 Q. B. D. 629, 635, 639; *Pollard*, 1888, 40 Ch. D. 345). In Scotland, the Courts have power by interdict to restrain a publication on the ground that it would be an injury to reputation or private feelings (Bell, *Com.* i. 116; *Cadell*, 1804, Mor. Literary Property, App. 13). It has been ruled in England, that if an unpublished work be of an immoral or blasphemous tendency, the author has no right of property in it. The unauthorised publication of such a work will not found a claim for damages, and cannot be restrained by injunction (*Southey, supra*, and *Dr. Priestley's* case, there referred to, at p. 437). This does not appear to be the law of Scotland (Bell, *Com.* i. 119); and Lord Eldon's decision in *Southey's* case has been the subject of adverse criticism in England (Campbell, *Lives of the Chancellors*, x. 254; Copinger, p. 87). Giving or lending any literary composition or work of art for a special purpose under a contract, or under any trust, does not authorise the recipient to reproduce or publish (*Mayall*, 1862, 1 H. & C. 148). This extends to limited publication, such as a lecture, where the delivery is not public (*Abernethy*, 1824, 1 H. & Tw. 28; *Caird*, 1887, 14 R. (H. L.) 37, L. R. 12 App. Ca. 326).

In the case of private letters, the property in the actual letters is in the receiver, but the sender retains the right of prohibiting their publication, and this right extends to his representatives. In the case of *Cadell* (1804, Mor. Literary Property, App. 13), the recipient of Robert Burns's "Letters addressed to Clarinda," and her publisher, were interdicted, on the application of Burns's representatives, from publishing some of the letters. The Court proceeded upon the ground "that the communication in letters is always made under the implied confidence that they shall not be published without the consent of the writer, and that the representatives of Burns had a sufficient interest, for the vindication of his literary character, to restrain this publication." (See also *Pope*, 1741, 2 Atk. 341; *Thompson*, 1774, Amb. 737; *Earl of Lytton*, 1884, 52 L. T. 121). In England, the right of the sender of letters to restrain publication seems to be absolute (*Gee*, 1818, 2 Swans. 402). It is doubtful if this is so in Scotland. The granting of interdict in Scotland is always in the discretion of the Court. In *White* (1881, 8 R. 896), an application for interdict by one of the parties to correspondence was refused where it was proposed to print the correspondence for private circulation. Although the printing in this case was for private circulation only, the principles laid down would seem to

apply even where the publication is to be general, if it is for the information of the public as to facts in a controversy between the parties. *White* was decided expressly on the ground that no question of *literary property* arose in it. The editor of a newspaper may not publish a letter sent to him for publication, if the writer previously expresses a desire to withdraw it (*Davis*, 1855, 17 D. 1166). An exception to the writer's right of restraining publication occurs where the production of letters is required in a Court of Justice (Bell, *Com.* i. 117, and opinion of Ld. Eldon in *Gee*, at p. 427; *Hopkinson*, 1867, L. R. 2 Ch. 447; Dickson, *Evidence*, ss. 1367, 1376).

What constitutes publication is discussed under the various heads of published works.

II. Copyright in Published Works.

1. Books.
2. Lectures.
3. Drama.
4. Music.
5. Fine Arts.
6. Colonial Copyright.
7. International Copyright.

1. BOOKS.

Statutes.

15 Geo. III. c. 53 (The Copyright Act, 1775).
5 & 6 Vict. c. 45 (The Copyright Act, 1842).
39 & 40 Vict. c. 36, ss. 42, 44, 45, 152 (Customs Consolidation Act, 1876).
49 & 50 Vict. c. 33, s. 8 (International Copyright Act, 1886).
52 & 53 Vict. c. 42, s. 1 (Revenue Act, 1889).

For more than two centuries after the invention of printing, the right to print books was regulated in Scotland by an exercise of the Royal prerogative, the Estates of Parliament occasionally interposing their authority, as in the Act 1540, c. 127. In England, the Crown exercised a similar power, and Parliament intervened in a like manner (13 & 14 Chas. II. c. 33). But it was not until 1709 that permanent statutory protection was given to an author's copyright. In that year an Act (8 Anne, c. 19) was passed which applied to England and Scotland both. By it copyright was given to an author or his assignees for a term of fourteen years from the date of first publication, with another fourteen years should the author be alive at the end of the first term.

The question was formerly much agitated whether there is copyright at common law, or whether copyright is the mere creature of Statute.

In England, during the last century, the bulk of legal opinion was in favour of a common-law right in perpetuity (see *Millar*, 1769, 4 Burr. 2303; *Donaldson*, 1774, 4 Burr. 2408). In the latter case, although the existence of the common-law right was affirmed, it was held by the House of Lords, in accordance with the opinion of a majority of all the judges, that that right had been taken away by the wording of the Statute of Anne, which declared that copyright should exist for a certain term of years "*and no longer*." The existence of any common-law right was, however, denied by several judges and by the three Law Lords in *Jefferys*

(1854, 4 H. L. Rep. 815). In Scotland, the common-law right was emphatically denied (*Midwinter*, 1748, Mor. 8295; 1751, 1 Pat. 488; *Hinton*, 1773 Mor. 8307). In the case of *Hinton*, the common-law right was only affirmed by one judge—Ld. Monboddo—and denied by eleven (see opinions of some of the judges in the report of *Caddell*, 5 Pat. 505, and separate report by James Boswell).

The period of endurance of copyright was altered and extended by 54 Geo. III. c. 156, s. 4; but both this Act and the Statute of Anne were repealed by the Copyright Act, 1842 (5 & 6 Vict. c. 45).

In the Act of 1842 a book is defined as including "every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published." Music, maps, charts, and plans may be the subject of copyright under the Dramatic and Musical and Fine Art Copyright Acts (see *infra*, pp. 305, 307), as well as the subject of literary copyright under this Act.

What may be the Subject of Copyright?—In the first place, the work must be original (*White*, 1890, 18 R. 223). There can be no copyright in a mere reprint. Although there is no copyright in ideas, there may be in words (see the American cases of *Perris*, 1878, 99 U. S. (9 Otto) 674: and *Baker*, 1879, 101 U. S. (11 Otto) 99). Although there is no copyright in news, there is in the form in which it is published (*Walter* (1892), 3 Ch. 489: but see *Exchange Telegraph Co.* (1896), 1 Q. B. 147). There is no copyright in an opinion, but there is in the mode of its expression (*Chilton* (1895), 2 Ch. 29). (2) The work must come within the definition in the Statute. A piece of cardboard cut so that, when held up to the light, it cast a shadow resembling the well-known picture "Ecce Homo," accompanied by a slip of paper with a verse of non-copyright poetry, was held not to be entitled to copyright (*Cable*, 1882, 52 L. J. Ch. 107; contrast *Hildesheimer*, 1891, 64 L. T. 452). The printed face of a barometer was held not to be within the definition (*Davis*, 1885, 52 L. T. 539); nor a cardboard pattern-sleeve for ladies' dresses with descriptive words printed upon it (*Hollinrake* (1894), 3 Ch. 420). (3) The work does not require to be literary in character. "The Act does not confine the privilege to works of literary merit. On the contrary, mere compilation and arrangement, as in a court calendar, or an almanac,—the mere results of inquiry, as in a road-book or guide-book,—and so on, may be the subjects of copyright" (per Ld. Deas in *Maclean*, 1858, 20 D. at p. 1163). Thus there has been held to be copyright in *letters* (*Caddell*, 1804, Mor. Literary Property, App. 13); *Dodsley*, 1775, Mor. Literary Property, App. 1); in a *road-book* (*Taylor*, 1776, Mor. 8308); in a book of *legal styles* (*Alexander*, 1847, 9 D. 748); in *school-books* for children (*Lennie*, 1843, 5 D. 416); in a list of imports and exports of goods, called the "Clyde Bill of Entry" (*Maclean*, 1858, 20 D. 1154); in a *directory* (*Kelly*, 1866, L. R. 1 Eq. 697; *Morris*, 1870, L. R. 5 Ch. 279); in a *trade catalogue* (*Hothen*, 1863, 1 Hem. & M. 603; *Maple*, 1882, L. R. 21 Ch. Div. 369); in the headings and arrangement of a *series of advertisements* (*Lamb*, 1892, 3 Ch. 462); in a *trade price-list* (*Harpers Limited*, 1892, 20 R. 133; contrast *White*, 1890, 18 R. 223); in a *gazetteer* (*Lewis*, 1839, 2 Beav. 6); in a *railway time-table* (*Leslie*, 1893, 20 R. 1077, 21 R. (H. L.) 57; (1894) App. Ca. 335). (4) But to entitle to copyright there must be independent labour and original work of some sort on the part of the compiler (see opinion of Lord Herschell in *Leslie*, *supra*).

The rule is laid down in England, that there cannot be copyright in an immoral, blasphemous or libellous publication (*Stockdale*, 1826, 5 B. & C. 173; *Lawrence*, 1822, 1 Jacob, 471, and cases at p. 474; *Dodson*, Solicitors'

Journal, 1880, p. 572). There is no authority in Scottish law on this point. Should the question arise, the law would probably be held to be the same as in England (see *Macfarlane*, 1883, 10 R. 801, opinion of L. P. Inglis, at p. 807), notwithstanding the difficulty of applying the doctrine (see Campbell, *Lives of the Chancellors*, x. 254, and Story, *Equity Jurisprudence*, s. 938). An interesting case involving this question was decided in the Sheriff Court of Lanarkshire (*Hopps* v. *Long*, cited in Copinger, p. 94; reported *Times*, 26 Feb. 1874, and *Edinburgh Courant*, 27 Feb. 1874). There is no copyright in a book that is a fraud upon the public (*Wright*, 1845, 1 C. B. 893; *Macfarlane*, *supra*).

There may be copyright in part of a work, without right to the whole (*Lamb*, 1893, 1 Ch. 218). The author of notes on a work which is itself beyond the term of monopoly, has property in those notes (Bell, *Com.* i. 122: *Black*, 1870, 9 M. 341, and cases there).

Each new edition may be the subject of copyright if the additions and alterations are substantial (*Murray*, 1852, 1 Drew. 353; *Black*, *supra*; *Thomas*, 1886, 33 Ch. D. 292. But see *Hodderwick*, 1841, 3 D. 383). What amounts to sufficient change to entitle a new edition to fresh copyright is a question of fact in each case. "Questions of great nicety and difficulty may arise as to how far a new edition of a work is a proper subject of copyright at all; but that must always depend upon circumstances. A new edition of a book may be a mere reprint of an old edition, and plainly that would not entitle the author to a new term of copyright running from the date of a new edition. On the other hand, a new edition of a book may be so enlarged and improved as to constitute in reality a new work, and that just as clearly will entitle the author to a copyright running from the date of the new edition" (per L. P. Inglis in *Black*, *supra*, at p. 343). Lord Deas, in *Black* (*supra*), was of opinion that the alteration of *one word*, if an important word, might be enough.

As to *abridgments*, the law of England seems to permit almost any abridgment of a copyright work, if it be a fair abridgment and not merely colourable (*Gyles*, 1740, 2 Atk. 141: *Dodsley*, 1761, Amb. 402; *Newberry*, 1774, Lofft, 775; but see *Tinsley*, 1863, 1 Hem. & M. 747, and *Dickens*, 1844, 8 Jur. 183). This has been followed in the United States (Scrutton, 133), where the state of the law has been the subject of severe comment (Curtis on *Copyright*, quoted in Copinger, p. 228). It is doubtful if a rule which, when stretched as far as it has been in England and America, seems to be contrary to sound principle, would be followed in Scotland. In the only reported case on the subject (*Murray*, 1785, Mor. 8309), an abridgment was found to be an infringement of copyright. Prof. Bell (*Com.* i. 121) gives his countenance to the abridger's right.

There may be copyright in a *translation* (*Wyatt*, 1814, 3 V. & B. 77; *Murray*, 1852, 1 Drew. 353). For international law as to translations, see *infra*, p. 313. In law reports, copyright exists in the rubrics (*Butterworth*, 1801, 5 Ves. 709; *Sweet*, 1855, 16 C. B. 459), but not in the opinions of the judges. (This has been specially decided in America—*Banks*, 1888, 128 U. S. 244, and cases there.)

As a general rule, there cannot be copyright in the title or name of a book (*Maxwell*, 1867, L. R. 2 Ch. 307; *Dicks*, 1881, L. R. 18 Ch. D. 76, 93). But it is thought there might be, if there were something decidedly original in the arrangement of words which form the title. The unauthorised appropriation of the title of a book or newspaper is more of the nature of an infringement of a trade name, or it is a common-law fraud, and may be interdicted (*Edinburgh Correspondent*, 1822, 1 S. (N. E.) 407;

Constable, 1824, 3 S. 215; *Chappell*, 1855, 2 Kay & J. 117; *Metzler*, 1878, L. R. 8 Ch. D. 606; *Dicks, supra*; *Walter*, 1885, 54 L. J. Ch. 1059; *Schove*, 1886, L. R. 33 Ch. D. 546; *Borthwick*, 1888, L. R. 37 Ch. D. 449; *Licensed Victuallers' Newspaper Co.*, 1888, L. R. 38 Ch. D. 139).

If it were not for the Copyright Act, publication of a book would amount to abandonment of it to the world, and consequently there would be complete loss of copyright. So, to entitle a book to the benefit of the Act, there must not have been prior publication,—that is to say, the first publication must be in the British dominions (*Routledge*, 1868, L. R. 3 H. L. 100; Act 1886, s. 8; but see *Reid*, 1886, 2 T. L. R. 790), or in a country publication in which secures copyright in the United Kingdom under the International Copyright Acts. If there is prior publication, copyright will be lost. Simultaneous publication in this country and abroad will not affect copyright in the United Kingdom.

To constitute publication, there must be public circulation. Private circulation is not sufficient (*White*, 1819, 2 B. & A. 298; *Prince Albert*, 18 L. J. (N. S.) Ch. 120). Delivery of a lecture to a limited audience is not publication (*Caird*, 1887, 14 R. (H. L.) 37; L. R. 12 App. Ca. 326, and cases there). Transmission of news by means of tape-telegraph machines to subscribers, under a contract that they will not copy it, is not publication (*Exchange Telegraph Co.* (1896), 1 Q. B. 147).

The main provisions of the Act of 1842, which extends to all the British dominions (s. 29), relative to literary copyright, are as follows:—

Copyright in a book published in the lifetime of its author endures for WHICHEVER MAY BE THE LONGER OF THE TWO FOLLOWING TERMS: (1) THE LIFE OF THE AUTHOR AND A FURTHER TERM OF SEVEN YEARS; (2) FORTY-TWO YEARS FROM PUBLICATION. In the case of a book published *after* the death of its author, the proprietor of the MS. and his assigns have copyright in it for a term of forty-two years from publication (s. 3). Provided the first publication of his work be in the British dominions, every British subject may acquire copyright whether he is resident in the British dominions or not (Copinger, p. 121; Act 1886, s. 8). There is a question as to what circumstances are necessary to enable an alien to acquire copyright in the United Kingdom, apart from copyright conventions. The better opinion seems to be that his rights are co-extensive with those of a British subject (*Routledge*, 1868, L. R. 3 H. L. 100, opinions of Lords Cairns and Westbury; Stephen, *Dig. Copyright Com. Rep.* 1878, p. lxix, note; 33 & 34 Vict. c. 14, s. 2; Scrutton, pp. 120–22). If this opinion is sound, *Jefferys* (1854, 4 H. L. Rep.) can no longer be considered an authority. Residence in the British dominions, coupled with publication in the British dominions, in any case gives copyright (*Routledge, supra*, and Act 1886, s. 8). The Judicial Committee of the Privy Council, on complaint that the proprietor of the copyright in any book, after the death of its author, has refused to allow its publication, may grant a licence for republication (s. 5). A copy of every book published in the United Kingdom, and of every subsequent edition, with additions or alterations, must be delivered to the following libraries, viz.: British Museum; Bodleian, Oxford; Public Library, Cambridge; Advocates, Edinburgh; Trinity College, Dublin; the precise rules as to the delivery of books to the libraries are set forth, secs. 6–10. A register book is kept at Stationers' Hall, open to public inspection upon paying a fee of a shilling, wherein may be entered the proprietorship in the copyright of books and assignments thereof. A certified copy of any entry, to be had for five shillings, is to be received in evidence in all Courts, and is *prima facie* proof of what it expresses, but may be rebutted (s. 11) (*Jeffreys*, 1856, 18 D. 906;

affd. H. L. 1859, 3 Macq. 611). False registration is a misdemeanour (s. 12). The title of the book, the time of first publication, the name and place of abode of the publisher, and the name and place of abode of the proprietor of the copyright, must be entered (s. 13). The time of first publication must be the true time—a statement of the time of publication of a third edition will not do (*Thomas*, 1886, L. R. 33 Ch. D. 292). Not only the month but the day must be stated (*Mathieson*, 1868, L. R. 7 Eq. 270). Registration cannot precede publication (*Henderson*, 1877, 5 Ch. D. 892). Registration is not compulsory, and copyright exists without it; but no action can be maintained without previous registration (s. 24). It can be effected any time before an action is raised, even after the infringement complained of (*Goubaud*, 1877, 36 L. T. 704). If any person thinks himself aggrieved by any entry, he may apply to the Queen's Bench Division of the High Court of Justice for an order that such entry may be expunged or varied. For "a person aggrieved," see *Graves'* case, 1869, L. R. 4 Q. B. 715. A person may employ another to write a book, or any portion thereof, upon the terms that the copyright shall belong to such employer, in which case he has the same right as the author, provided the author is paid for the copyright (s. 18). It is laid down that a contract to pay is not enough (*Richardson*, 1851, 1 Sim. N. S. 336; *Trade Auxiliary Co.*, 1889, L. R. 40 Ch. D. 425). But the words "paid for," the first time they occur, in sec. 18, cannot be grammatically construed. Even if the author is paid, it must be clear that the terms were that the copyright is to belong to the employer (*Walter*, 1881, L. R. 17 Ch. D. 708). Whether there has been such an agreement, and what are its terms, is a question of fact which may be proved by parole (see *Bishop of Hereford*, 1848, 16 Sim. 190; *Trade Auxiliary Co., supra*; and *Lamb* (1893), 1 Ch. 218). In the case of articles in reviews, magazines, or other periodicals, where the proprietor has the copyright, he cannot publish such articles in a separate form without the author's consent, and the copyright reverts to the author after twenty-eight years. An author may reserve the right of publishing separately (s. 18). In the absence of agreement (express or implied), it would appear that the author has the copyright (Scrutton, p. 123). For what is publication in a separate form, see *Mayhew*, 1860, 1 John. & H. 312; *Smith*, 1863, 4 Gif. 632; *Johnson* (1894), 3 Ch. 663. The proprietor of a copyright in an encyclopædia magazine or book published in parts, obtains the benefit of registration at Stationers' Hall by registering the publication of the first number or part (s. 19) (*Henderson*, 1876, L. R. 4 Ch. D. 163). This extends to newspapers (*Cate*, 1889, L. R. 40 Ch. D. 500), to a contribution in parts to a periodical, where the author has not parted with the copyright (*Johnson, supra*), and to a monthly time-table (*Leslie*, 1893, 20 R. 1077).

Copyright is personal or moveable estate (s. 25). There may be joint ownership of copyright (*Trade Auxiliary Co.*, 1888, L. R. 40 Ch. D. 425).

Assignation.—Assignation of copyright may be made by entry in the register; and an assignment so entered is as effectual as if made by deed (s. 14). In England, an assignment, to be effectual, if not entered, must be in writing (*Leyland*, 1876, L. R. 4 Ch. D. 419). It is not clear whether, by the law of Scotland, writing is required to transfer copyright (*Jeffreys*, 1856, 18 D. 906). The statements in Bell, *Prin.* ss. 1361 and 1457, are not supported by authority. If writing is required, a receipt for money paid for the copyright would probably be enough (*Jeffreys*). In England, this is not so (*Lover*, 1856, 1 C. B. (N. S.) 182). If an assignment is in writing, it will be subject to stamp duty (54 & 55 Vict. c. 39, s. 54). The sale of stereotype plates does not pass the copyright in the book, unless

such is the intention of parties (Copinger, p. 175; *Fullerton*, 1850, 13 D. 219; *Cooper* (1895), 1 Ch. 567). A limited or partial copyright may be sold or assigned (*Fullerton, supra*; *Trade Auxiliary Co.*, 1888, L. R. 40 Ch. D. 425). The assignor of copyright is entitled after the assignment, in the absence of a special contract to the contrary, to continue selling copies of the work printed by him before the assignment, and remaining in his possession (*Taylor*, 1869, L. R. 7 Eq. 418).

Infringement of Copyright.—Infringement, whether by printing or importation, renders the offender liable to an action of damages in the Court of Session (s. 15); and if, in such an action, it is alleged in defence that the pursuer is not the author or first publisher of the book, the defender must state the name of the person who he alleges is the author or first publisher (s. 16). Importation, for sale or hire, of books wherein there is copyright in the United Kingdom, but reprinted abroad, and the exposure for sale or hire thereof, is forbidden under penalties. Officers of Customs or Excise have power to seize and destroy such books (s. 17). By the Acts 39 & 40 Vict. c. 36, ss. 42, 44, 45, 152, and 52 & 53 Vict. c. 42, s. 1, this power is extended to all importation, without the limitation that it be for sale or hire, provided that the proprietor of the copyright gives notice to the Commissioners of Customs that such copyright subsists, and states when it expires. It is to be noted that there is a difference in the Act of 1842 between the prohibition against importation, which is against importation simply, and the prohibition against selling or exposing for hire, which must be "knowingly" (s. 17). See *Cooper*, 1880, 15 Ch. D. 501. Sec. 23 of the Act of 1842 declares all pirated copies to be the property of the proprietor of the copyright. All actions for any offence under the Act of 1845 must be commenced within twelve months (s. 26). This does not apply to actions for delivery of books to any of the libraries before mentioned (s. 26). The word offence has been strictly construed, and the section seems not to apply to an action for the enforcement of any right which is a necessary consequence of the copyright conferred by sec. 3 of the Act (*Stewart*, 1846, 9 D. 1026, 1029; *Hogg*, 1874, L. R. 18 Eq. 444. See also *Clark*, 1804, Mor. Literary Property, App. 9, and *Tennyson*, 1871, 43 Sc. Jur. 278; and cf. *Cadell* v. *Robertson*, 1811, 5 Pat. 493, opinion of Ld. Eldon, at p. 503: "If a civil right is given by Statute, the party will be entitled to all the benefits known in the common law for the protection of that right." (But see opinion of Mr. Justice Willes in *Wolverhampton New Waterworks Co.*, 1859, 28 L. J. (C. P.), at p. 246).

Infringement of copyright is closely connected with the department of the subject which declares what may be the subject of copyright, and reference is made to the cases cited pp. 293, 295, which are nearly all examples of infringement. Piracy is the word usually applied to the wilful infringement of copyright. It must be distinguished from plagiarism, as there can be plagiarism without infringement of copyright, and piracy without plagiarism. When there is pure piracy, or the copying of a complete work, there seldom arises any question of difficulty, if the proprietorship of the copyright be not in doubt. The law is clear against the "printing or otherwise multiplying copies" of any book. It is an infringement of copyright to do so, even although the copies are not for sale (*Novello*, 1852, 12 C. B. 177; *Ager*, 1884, L. R. 26 Ch. D. 637). Copying in MS. is an infringement quite as much as printing (*Novello, supra*; *Worne*, 1888, L. R. 39 Ch. D. 73); printing in shorthand also (*Nicols*, 1884, L. R. 26 Ch. D. 374). *Bona fides* is no defence (*Scott*, 1867, L. R. 3 Eq. 718; *Roworth*,

1807, 1 Camp. 94, opinion of Ld. Ellenborough, at p. 97). When the alleged piracy consists not of copying a book *simplicitor*, but of copying the plan of a work or making long extracts from it, the questions that arise are not so easy of solution. No one has a right to copy bodily and use the work of another to the detriment of the original author (*Murray*, 1785, Mor. 8309; *Clark*, 1804, Mor. Literary Property, App. 9). In *Roworth* (*supra*), the test applied was whether the pirated copy would serve as a substitute for the original work. In more recent years the question that the English Courts have paid more attention to, is whether the alleged piracy is a pure copy or whether it shows original work and ingenuity on the part of the copier. (See the cases on *Abridgments*, *supra*, p. 294.) A recent writer on the law of copyright says: "The English law lays too much stress on new matter added, too little on old matter taken" (Scrutton, p. 136; see the case of *Spiers*, 1858, 6 W. R. 352, quoted by Scrutton). It is thought that the sound principle of law is rather to consider whether an unfair use of another's work has been made by way of copy, to the loss, injury, and damage of the original author. Copious extracts, of course, are permitted for the purpose of a review. But if these are so extensive as to extract the whole value, or the most valuable part, of the work of an author, there will be infringement (Bell, *Com.* i. 121). "Acknowledged quotations, even from copyright works, if they are quotations fairly made, either for the purposes of criticism or illustration, are not infringements of copyright. To hold anything else would be to sentence to death all our reviews, and the greater part of our works in philosophy. If, indeed, the quotation is colourable, and made for the mere purpose of inserting a large portion of the copyright work, the result would be different" (per Ld. Kinloch in *Black*, 1870, 9 M. 341, 356). For cases where extracts have been held as not exceeding the limits of fair quotation, see *Whittingham*, 1817, 2 Swans. 428; *Bell*, 1839, 17 L. J. (8 N. S.) 141; and for cases where they have been held as so exceeding, *Campbell*, 1842, 11 Sim. 31; *Smith*, 1874, 31 L. T. (N. S.) 775; *Maxwell*, 1874, 30 L. T. (N. S.) 11; and cf. *Walter* (1892), 3 Ch. 489. It is a jury question in each case (Bell, *Com.* i. 121). The two cases last cited show that alleging a custom of trade, in the case of one newspaper copying from another, is no defence. Where there is quotation or copying in works other than reviews, the question will be, Is the amount taken substantial? (*Bohn*, 1846, 10 Jur. 420).

There is no piracy where two authors go to the same source—a source open to all—and produce work which is similar in character (*Pike* (1869), L. R. 5 Ch. 251). Whether the later author has copied from the earlier is a question of fact in each case (*ib.*). That there has been copying may be inferred from facts and circumstances. "The recovery of the MS. or the product of scissors and paste might furnish convincing evidence" (per Ld. M'Laren in *Harpers*, 1892, 20 R. at p. 144). For a curious case of accidental likeness, see *Reichardt* (1893), 2 Q. B. 308. If an author or compiler is making a work from sources common to all, he must do original work, and must not merely copy a predecessor in the same field. For example, the compiler of a directory or guide-book, containing information derived from sources common to all, which must of necessity be identical in all cases if correctly given, is not entitled to spare himself the labour and expense of original inquiry by adopting and republishing the information contained in previous works on the same subject. He must obtain and work out the information independently for himself (*Kelly*, 1866, L. R. 1 Eq. 697; *Lewis*, 1839, 2 Beav. 6). He may use a previous work for the purpose of verifying results (*Kelly*, *supra*; *Leslie*, 1893, 20 R. 1077); and

for a certain limited use of a predecessor's work which was considered admissible, see *Morris*, 1870, L. R. 5 Ch. 279). If one party has simply copied information from a source open to anyone, a free use may be made of his work by anyone engaged in making a copy of a similar kind (*Leslie*, 1893, 20 R. 1077; 1894, 21 R. (H. L.) 57; 1894, App. Ca. 335). But the second compiler may not copy the arrangement: anything really original in the first work will be entitled to protection. *Leslie* was the case of a railway time-table compiled by a private individual from the time-tables of various railway companies; and where the tables were simple copies from the tables issued by the railway companies, they were not protected, but a selection and arrangement of circular tours was held by the House of Lords entitled to protection by interdict. The question in a case of this sort is: Has there been a substantial appropriation by the one party of the independent labour of the other? (per Ld. Herschell in *Leslie* (1894), App. Ca. at p. 341, 21 R. (H. L.) at p. 58).

The results of research, though embodied in a book and although proper subjects for copyright, cannot be the absolute property of the author, so as to disentitle any other person to make use of them. The words of Lord Ellenborough in this connection illustrate a principle not to be lost sight of: "That part of the work of one author is found in another is not of itself piracy or sufficient to support an action; a man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science and the benefit of the public: but, having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the *animus furandi*? . . . . While I shall think myself bound to secure every man in the enjoyment of his copyright, *one must not put manacles on science*" (*Cary*, 1802, 4 Esp. 167).

It is difficult to reconcile the absolute right of an author with the freedom of using the results of other men's labours which is necessary for the advancement of learning and science. The *animus furandi* cannot be the sole test, as *bona fides* in copying is not a good defence: but the presence or absence of the *animus furandi* may throw light upon the question whether a fair use has been made of a predecessor's work (*Jarrold*, 1870, 18 W. R. 279; *Jarrold*, 1857, 3 Kay & J. 708; *Ager*, 1884, L. R. 26 Ch. D. 637; *Atlas Co.* v. *Fullerton*, 1853, report by J. M. Duncan).

How far is the *oral delivery* of printed matter an infringement of copyright? Scrutton (p. 68) thinks that in principle it is an infringement. This is very doubtful. The Statute prohibits "multiplying copies" only, and there is no rule of the common law against recitation or reading (cf. opinion of Page Wood, V. C., in *Tinsley*, 1863, 1 Hem. & M. at p. 751; Stirling, J., in *Hanfstaengl* (1894), 3 Ch. at p. 116). This doctrine underlies all the decisions declaring that dramatising a novel is not an infringement of copyright (*Warne*, 1888, L. R. 39 Ch. D. 73). For infringement of copyright in books by dramatisation, see under *Dramatic Copyright*, *infra*, p. 304.

Remedies for Infringement.—(1) Interdict. (2) An action of damages; either accompanied by a declarator of the right or otherwise (Bell, *Com.* i. 123; *Tennyson*, 1871, 43 Sc. Jur. 278). The limit of six months in the Act of 1842 does not apply to such an action (see *supra*, p. 297). (3) An action for the recovery of copies unlawfully printed or imported, these being declared to be the property of the proprietor of the copyright by the Act of 1842, s. 23. Before raising this action, demand must be made in writing for the delivery of the copies. An *offender* against the Copyright Act, besides being liable to these actions, is also liable to have the copies of

any pirated work in his possession destroyed by Customs or Excise officers, and, on conviction of an offence before two justices of the peace, to be fined £10 and double the value of every copy of such work (Act 1842, s. 17; and see *ante*, p. 297).

Crown Copyright.—The Crown, or its licensee, has in Scotland the sole right of printing the Bible, Psalm-Book, Confession of Faith, the Larger and Shorter Catechisms, and the Book of Common Prayer (*H. M. Printer and Stationer*, 1790, Mor. 8316; *King's Printer*, 1823, 2 S. 275, 3 W. & S. 268: *King's Printer*, 1826, 4 S. 567, 3 W. & S. 268). This applies to the text only. If there be a commentary or notes added, it is open to anyone to print, unless the commentary is so short as to be merely a pretext for evading the exclusive right (*H. M. Printer and Stationer, supra*). The grounds upon which this exclusive privilege of the Crown is based are not very certain, and the reasons given by the judges, both in Scotland, and in the cases in England declaring a similar right in the Crown, are unsatisfactory, and sometimes contradictory, but the judgment of the House of Lords in the cases quoted must be taken as firmly establishing the right.

The exclusive right of printing Acts of Parliament, Edicts, and Royal Proclamations, is also vested in the Crown. As in the case of Bibles, the addition of a *bonâ fide* commentary or notes entitles the author to print the text of a Statute (*Baskett*, 1 W. Bl. 370; Copinger, p. 320).

Up to the year 1839, the privilege of printing books, the copyright of which is in the Crown, was granted as a monopoly to a firm of printers. Since that date "Her Majesty's sole and only master printers for Scotland" are a Board appointed by the Crown, commonly called the "Bible Board." Since 1890, the Crown has given up the control of the printing of the works mentioned above, except the Bible, and it is open to any printer to print any one of them, except the Bible, without any licence. The printing of the Bible is still subject to the supervision and control of the Board. The Lord Advocate grants a licence to any printer to print the Bible, on his giving a bond of caution to the Lord Advocate for the conformity of the text to the Authorised Version. Conformity is secured by the Board's supervision of the printing. A similar prerogative exists in the Crown in England (Copinger, chap. ix.).

University Copyright.—By the Act 15 Geo. III. c. 53, the Universities of Oxford, Cambridge, St. Andrews, Glasgow, Aberdeen, and Edinburgh, and the Colleges of Eton, Westminster, and Winchester, have right in *perpetuity* to any copyright that has been or may be given or bequeathed to them. But this right subsists only so long as the books are printed at their own printing presses within the said universities or colleges (s. 3); and to make it effectual, the copyright must be entered at Stationers' Hall within two months after the bequest or gift has come to the knowledge of the University authorities (s. 4). This copyright cannot be granted or leased to anyone, under penalty of forfeiture, but it may be sold in the same manner as any other copyright.

II. LECTURES.

Statute.

5 & 6 Will. IV. c. 65 (Lectures Copyright Act, 1835).

If a lecture is printed, there is copyright in it as a book.

At common law, a lecture delivered free to the public without conditions does not differ from a speech or other public communication. Public delivery amounts to publication, and there is no copyright there-

after (see opinion of L. P. Inglis in *Caird*, 1885, 13 R. at p. 33, and three propositions there laid down). But there may be a condition, express or implied, that persons hearing the lecture shall not print or publish what they hear (*Abernethy*, 1824, 3 L. J. 209; *Nicols*, 1884, L. R. 26 Ch. D. 374). In *Caird* (1885, 13 R. 23; 1887, 14 R. (H. L.) 37, L. R. 12 App. Ca. 326), the doctrine of implied contract was extended to a professor's lectures in a university, the argument that there was no room for contract in the relation of professor and student being rejected. If a professor's lecture were public, if it were "the authorised exposition of University teaching," there might be copyright in it (per Ld. Halsbury in *Caird*, 14 R. (H. L.) 39, L. R. 12 App. Ca. 337). So there is no copyright in a sermon where church doors are open to all (*ib.*).

The Act of 1835 gives copyright in lectures (other than those delivered in a university or public school, or on any public foundation), provided that, two days before the delivery of a lecture, notice is given in writing to two justices of the peace living within five miles of the place where the lecture is to be delivered. Penalties are imposed for infringement (s. 1), and newspapers are specifically forbidden to print and publish such lectures (s. 2).

III. DRAMA.

Statutes.

3 & 4 Will. IV. c. 15 (The Dramatic Copyright Act, 1833).
5 & 6 Vict. c. 45, ss. 20, 21, 22 (The Copyright Act, 1842).

There are two distinct rights in dramatic pieces: (1) the right of multiplying copies of the written or printed work, *i.e.* copyright proper, and (2) the right of representation. The latter has come to be called playright, which is a convenient term, although it is not used in the Statutes. These rights must not be confused, as the law applicable to one of them is different from the law to be applied to the other in some important particulars.

As with all unpublished compositions, the author has full control over the use of a MS. play, whether as to copying or acting. It was formerly held that acting does not amount to publication (see as to copyright, *Maclin*, 1770, Amb. 694: and compare the American case of *Palmer*, 1872, 7 American Reports, 480: as to playright, *Morris*, 1820, 1 Jac. & W. 481). But the word "published" in the International Copyright Act, 1844 (7 & 8 Vict. c. 12, s. 19), has been construed to include "acted" (*Boucicault* v. *Delafield*, 1863, 1 Hem. & M. 597; *Boucicault* v. *Chatterton*, 1876, L. R. 5 Ch. D. 267), so it may be said that it would probably be held in England that public acting under any circumstances would be publication so as to take away the common-law right of copyright and playright.

When a drama has been printed, it is a book, is subject to the same rules as have been laid down for books, and copyright in it is regulated by the Act of 1842. The rules as to what may be the subject of copyright in books extend to the copyright and the playright of dramas, as the underlying principles are the same. As to an adaptation, see *Hatton*, 1859, 7 C. B. (N. S.) 268. Whatever may be the state of the common law as to the effect of acting upon playright, the Act of 1833 provided that the author of any "tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment," *not printed and published*, shall have as his own property the sole liberty of representing or causing to be represented, at any place of dramatic entertainment, any such production (s. 1).

This would appear to give a right of representation of an unprinted dramatic piece to the author *in perpetuity*. Then the Statute gives the same right of representation to the author of a *printed and published* dramatic piece for his life or twenty-eight years, whichever be the longer. The Act of 1842 (s. 20) *extended* the liberty of representing a dramatic piece to the same term as copyright in books, *i.e.* whichever be the longer of the two following terms: (1) the life of the author and a further term of seven years; (2) forty-two years from publication (s. 20). It provided also that the first public representation or performance of a dramatic piece shall be equivalent to publication (s. 20). It is argued (Copinger, p. 335; Scrutton, p. 74; Sir James Stephen, *Dig. Copyright Com. Rep.* 1878, p. lxxii, note 2) that this section applies to MS. plays as well as printed ones, and that the effect of it, although the word "extend" is used, is to cut down the right of playright in perpetuity given by the Act of 1833 to the term above mentioned. It is stated that a Court of law would probably follow the judgment in *Donaldson* (1774), 4 Burr. 2408, and would hold the common-law right destroyed by the provisions of the Statute. But it may be doubted if this would be sound, as *Donaldson* was decided upon the ground that the Statute of Anne (8 Anne, c. 19) provided that copyright should subsist for a definite term "and no longer." The use, under a misapprehension by the Legislature, of a wrong word—the word "extend"—cannot surely derogate from the statutory right. "The view which the framers of a Statute, or the individual members of the Legislature, may for the time have entertained of the state of the common law, has no binding effect on the lieges, and cannot be taken notice of by a Court of law" (per L. P. Inglis in *Caird* v. *Sime*, 13 R. at p. 36). But the point is undecided, and the question whether there is playright beyond the statutory term is unsettled.

In order to obtain copyright and playright, the first publication of a play (which includes the acting of it) must take place in the British dominions (Act 7 & 8 Vict. c. 12, s. 19: *Boucicault* v. *Delafield*, 1863, 1 Hem. & M. 597; *Boucicault* v. *Chatterton*, 1876, 5 Ch. D. 267). From what has been stated, it will appear that an author of a dramatic piece in MS. has playright, probably in perpetuity, but, at any rate, for his LIFE PLUS SEVEN YEARS, OR FORTY-TWO YEARS FROM THE DATE OF THE FIRST REPRESENTATION OR PERFORMANCE, whichever be the longer. The author of a printed and published dramatic piece has playright for his life plus seven years, or forty-two years from the date of the first representation or performance, whichever be the longer. For common-law playright in the case of a printed drama, see *Murray*, 1822, 5 Barn. & Ald. 657, and *Coleman*, 1793, 5 T. R. 245. The cases are not clear; but it seems consistent with principle to hold that the printing of a play gives, at common law, to anyone who lawfully obtains a copy of it, the right to use it in any way he pleases, except multiplying copies of it (Bell, *Com.* i. 119). It may be observed here, that the period of copyright may differ from that of the playright in a published dramatic piece, as the copyright runs from the date of first publication, and the playright from the date of first representation, and these may be different. Copyright and playright may be assigned separately, and thus may become vested in different persons. An assignment of the copyright of a book containing a dramatic piece does not pass the playright unless an entry is made in the register at Stationers' Hall expressing the intention of parties to that effect (Act 1842, s. 22). But an assignation of playright, when express, does not require to be registered, to be effectual (*Lacy*, 1864, 4 B. & S. 873). It is not clear that an assignation, whether of playright or copyright, requires writing (see *supra*, p. 296, and the wording

of the Act, s. 2). But a licence to perform does. Publication of a dramatic piece as a book, before it has been publicly performed, does not affect the playright, and does not deprive the author of the exclusive right of performing it (*Chappell*, 1882, 21 Ch. D. 232). This case settles the law in opposition to the statement of Sir James Stephen in the *Report of the Copyright Commission*, 1878, p. lxxiii. There would probably have been no doubt about it but for his statement. Representing at any place of dramatic entertainment any piece in which there is copyright, without the consent of the author in writing, subjects the offender to a penalty of 40s. for each representation, or payment of the full benefit derived, or of the amount of injury sustained by the author, whichever be the greater (Act 1833, s. 2). All actions and proceedings under the Act of 1833 must be brought within twelve months after the offence is committed (s. 3). This would apply to penalties only. An action for damages for infringement of a right conferred by the Statute would not be subject to this limitation (see *Stewart*, 1846, 9 D. 1026, 1029; *Hogg*, 1874, 18 Eq. 444, and cases quoted *supra*, p. 297).

The Act of 1842 provides for the registration of playright (ss. 20, 24). But it is not compulsory, and, differing from the registration of copyright, is not a necessity before raising an action for infringement (s. 24) If registration of the playright in a MS. dramatic piece is made, the entry consists of the title, the name and place of abode of the author, the name and place of abode of the proprietor of the playright, and the time and place of the first performance (s. 20).

It is to be noticed that the definition of a dramatic piece in the Act of 1842 is wider than the list of subjects to which protection is given by the Act of 1833. The list in the Act of 1833 is: "Tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment." The Act of 1842 substitutes after the word farce, "or other scenic, musical, or dramatic entertainment." Questions as to what comes within the definitions in these Acts have been several times before the Courts in England, mostly in connection with music. The words "any scenic, musical, or dramatic entertainment," are very wide, and might include a single song. But they are to be construed as including only things *ejusdem generis* as the things previously enumerated (*Fuller* (1895), 2 Q. B. 429, and cases there). They have been held to include the introduction to a pantomime (*Lee*, 1847, 3 C. B. 871). Every case, however, must depend upon its own attendant circumstances. In each case it is a question of fact (per A. L. Smith, L. J. in *Fuller*, at p. 442).

In the Act of 1833 the grant of the sole right of performing a dramatic piece is limited by the words "at any place or places of dramatic entertainment." But the right given by sec. 20 of the Act of 1842 is not so restricted, and questions of difficulty have arisen as to the incorporation by the one Statute of the provisions of the other. The provisions of the Act of 1833 were extended to musical compositions by the Act of 1842. In *Duck* (1883, L. R. 12 Q. B. D. 79; 1884, 13 Q. B. D. 843), penalties for the infringement of dramatic playright were not recovered, because the performance complained of took place in a place which the Court considered was not a "place of dramatic entertainment," being of opinion that in an action for penalties the Act of 1842 is not to be considered. In *Wall* (1883, L. R. 11 Q. B. D. 102), the same Court had previously decided that singing a song did not require to be at a place of dramatic entertainment to be an infringement of the right of representation. The Court of Appeal, in deciding those cases, seemed to consider that there is a difference between

an infringement of dramatic playright and an infringement of musical playright. But the cases are not easy to reconcile; and it is not quite clear why, in an action for penalties for the infringement of dramatic playright, the Act of 1842 has nothing to do with the question, as was stated in *Duck* (13 Q. B. D. 845, 851, and 12 Q. B. D. 82). As to what is a place of dramatic entertainment, *Duck* decided that a performance of a play in a room of an hospital, for the entertainment merely of those connected with the hospital, is not performance at a place of dramatic entertainment. In this case the performance was in no way public, and the Court considered that an element of importance. No one can be considered an offender against the provisions of the Dramatic Copyright Acts, so as to be liable to an action at the instance of the proprietor of the playright, unless he himself, or by his agent, actually takes part in the representation. So the proprietor of a room in which the representation took place, who had nothing to do with the acting, was found not liable (*Russell*, 1849, 8 C. B. 836).

Infringement of Playright.—A representation, to be an infringement of playright, does not require to be done knowingly (*Lee*, 1847, 3 C. B. 871). Although the Statute forbids the representing of any "production or any part thereof" (1833, s. 2), the part taken must be substantial and material (*Chatterton*, 1878, 3 App. Ca. 483). And this is a question for a jury in each case (*Planché*, 1837, 4 Bing. N. C. 17, and *Chatterton*). It would not be necessary that the very words of a drama should be taken, to render one modelled upon it an infringement of playright or copyright. If the plot and situations were copied, that would be sufficient (see *Chatterton*, *supra*).

Several cases have arisen about the dramatisation of novels. The result of these cases is that it is no infringement of the copyright in a novel to take it bodily and make a play of it,—using the names of the characters and the actual words of the novel,—but it is an infringement to make any copies of the drama thus composed, whether in print or MS. (*Reade* v. *Conquest* (1861), 9 C. B. (N. S.) 755; *Reade* v. *Conquest* (1862), 11 C. B. (N. S.) 479; *Tinsley*, 1863, 1 Hem. & M. 747; *Reade* v. *Lacy*, 1861, 1 John. & H. 524; *Warne*, 1888, 39 Ch. D. 73). But if a novel be founded upon a drama, and the novel be dramatised, there may be infringement of the playright of the first drama (*Reade* v. *Conquest*, 1862, 11 C. B. (N. S.) 479). If the copies of the drama necessary for the Lord Chamberlain and the actors were made up of passages cut from printed copies of the novel, it would not be an infringement (*Warne*, *supra*). Every dramatisation of a novel is a separate work. If there be two, one is not necessarily an infringement of the other. Where A. wrote a novel and afterwards dramatised it, but without printing, publishing, or representing it, and B., in ignorance of A.'s drama, also dramatised the novel in a different form, the representation of B.'s drama was held not to be an infringement of A.'s rights (*Toole*, 1874, L. R. 9 Q. B. 523). For a case of accidental resemblance between two plays, see *Reichardt* (1893), 2 Q. B. 308, where one was held not to be an infringement of the other. Playright, differing from copyright in a book, cannot be acquired by one employing another to write a drama for him, without an assignment in writing from the author (*Shepherd*, 1856, 17 C. B. 427; *Eaton*, 1888, 20 Q. B. D. 378). As to what constitutes joint authorship of a play, see *Levy*, 1871, L. R. 6 C. P. 523.

Remedies for Infringement.—(*a*) Copyright—same as books (p. 299). (*b*) Playright—(1) Interdict. (2) Action of damages. (3) Action for penalties (p. 303).

IV. MUSIC.

Statutes.

3 & 4 Will. IV. c. 15 (The Dramatic Copyright Act, 1833), as extended by secs. 20, 21, and 22 of the Act following.
5 & 6 Vict. c. 45 (The Copyright Act, 1842).
45 & 46 Vict. c. 40 (The Copyright (Musical Compositions) Act, 1882).
51 & 52 Vict. c. 17 (The Copyright (Musical Compositions) Act, 1888).

It has been seen that there are two kinds of copyright in the drama—copyright proper and playright. The same occurs in the case of musical compositions, with the additional complication that there may be both words and music, in either or in both of which there may be either or both copyright and playright. These rights may be vested in different individuals.

Copyright in music is THE SAME AS COPYRIGHT IN BOOKS AND DRAMATIC PIECES, the interpretation section (s. 2) of the Act 1842 including, under "book," a sheet of music. The rules, accordingly, which govern copyright in music are the same as the rules for books and dramas.

As to playright or the right of representation, it is almost the same as in the case of the drama. Only these points wherein it differs are here treated.

As to how far the provisions of the Act of 1833 are incorporated in the Act of 1842 in regard to musical compositions, see *Wall*, 1883, 11 Q. B. D. 102; *Duck*, 1884, 13 Q. B. D. 843; and *supra*, pp. 303, 304. The result of these cases would seem to be that playright in musical compositions is not confined to the right of representation at places of dramatic entertainment; but that to subject a performer to damages or penalties the place must be public.

By the Acts of 1882 and 1888 greater freedom has been given to the public performance of musical compositions than is allowed in the case of dramatic pieces. In consequence, questions have arisen as to when a musical composition is also a dramatic piece, so that the public performance of it may be proceeded against, notwithstanding the Acts of 1882 and 1888. In *Fuller* ((1895), 2 Q. B. 429), Ld. Esher, M. R., said: "I do not know that it is possible to define with precision what is a dramatic piece and what is a musical composition . . . To bring a musical composition within the Dramatic Copyright Act, 1833, it must have the qualities that belong to such dramatic pieces as are mentioned in that Act. Whether any particular subject-matter is only a musical composition, or whether it has also the characteristics of a dramatic piece, is a question of fact which must be submitted to a jury, if there is one, or determined as a question of fact by the judge, if there is no jury" (p. 434). In this case the Court of Appeal held that a song that does not require for its representation either dramatic effect or scenery, is not a dramatic piece, although it is intended to be sung in appropriate costume on the stage of music halls.

By the Acts of 1882 and 1888 it is provided that if the owner of the copyright in any musical composition, or his assignee, wishes to retain the exclusive right of public performance or representation, he shall print on the title-page a notice to that effect (1882, s. 1). If the playright and copyright are in separate hands before publication, the proprietor of the playright must give notice to the proprietor of the copyright that he desires to have a notice reserving the right of performance printed on the title-page. If the playright and copyright become vested in different

persons after publication, and if a notice has been printed on the title-page, if the proprietor of the playright wishes it *retained* he must give notice to the proprietor of the copyright (1882, s. 2). The latter is bound to insert such notices under a penalty of £20 (1882, s. 3). Damages and penalties are not fixed, but are to be reasonable, in the discretion of the Court (1888, s. 1), and expenses are in the absolute discretion of the Court (s. 2). The proprietor, occupier, or tenant of any place of dramatic entertainment is declared not liable to any penalty or damages in respect of an unauthorised performance, unless he wilfully causes or permits it (s. 3). See also *Russell*, 1849, 8 C. B. 836. The Act of 1888 does not apply to any action or proceedings in respect of a performance of an opera or stage play in a theatre or public place of entertainment (s. 4). As to what may or may not be the subject of musical copyright, see *D'Almaine*, 1835, 1 Y. & C. Exch. 288; *Leader*, 1849, 7 C. B. 4; *Lover*, 1856, 1 C. B. (N. S.) 182; *Wood*, 1868, L. R. 3 Q. B. 223; *Fairlie*, 1879, L. R. 4 App. Ca. 711.

Remedies for Infringement.—Same as drama (p. 304).

V. FINE ARTS.

(*a*) Engravings, Etchings, Prints, etc.
(*b*) Paintings, Drawings, Photographs.
(*c*) Sculpture.

It has been already stated that the maker of any work of art has complete control over the disposal of it until it is published (*supra*, p. 291). A doubt has been raised as to the existence of this right, in the case of paintings, drawings, and photographs, owing to the wording of the preamble of the Act 25 & 26 Vict. c. 68. For a discussion of this question, see Scrutton, *Copyright*, pp. 151–56. The doubt seems unfounded (see dictum of L. P. Inglis in *Caird*, quoted *supra*, p. 302; *Prince Albert* v. *Strange*, 1849, 18 L. J. (N. S.) Ch. 120; *Jeffreys*, 4 H. L. Rep. 815; and *Turner*, *infra*). But a difficulty, which is not so much felt in the case of books, arises as to publication. There is no clear rule as to what constitutes publication of a work of art. The only authority on the subject is an Irish case (*Turner*, 1860, 10 Ir. Ch. 120 and 510), where it was held that the exhibition of a picture in public galleries, copying not being permitted, did not amount to publication of it; and one who, by an arrangement of models representing the picture, made a photograph which closely resembled the picture, was restrained from publishing and selling copies of the photograph. Although in this case public exhibition was held not to be publication, the Lord Chancellor of Ireland in his judgment (at p. 516) defined publication, in the case of sculpture, to be when "the eye of the public is allowed to rest upon it."

(*a*) *Engravings, Etchings, Prints, etc.*

Statutes.

8 Geo. II. c. 13 (The Engraving Copyright Act, 1734).
7 Geo. III. c. 38 (The Engraving Copyright Act, 1766).
17 Geo. III. c. 57 (The Prints Copyright Act, 1777).
15 & 16 Vict. c. 12 (s. 14) (The International Copyright Act, 1852).
25 & 26 Vict. c. 68 (The Fine Arts Copyright Act, 1862).

Under the first four of the above Acts the law seems to be as follows:—

Everyone has for TWENTY-EIGHT YEARS, from the first publishing thereof, the sole right and liberty of multiplying, by any mechanical process by

which prints or impressions are capable of being multiplied indefinitely, copies of any print of whatever subject which he has—

(*a*) Invented or designed, engraved, etched, or worked in mezzotinto or chiaro-oscuro; or which he has,

(*b*) From his own work, design, or invention, caused or procured to be designed, engraved, etc.; or which he has

(*c*) Engraved, etc., or caused to be engraved, etc., from any picture, drawing, model, or sculpture, either ancient or modern (see Stephen, *Dig. Cop. Com. Rep.* lxxvi.).

Under the Act of 1862, the sole right of engraving or reproducing any painting or drawing is vested in the "author" thereof for his life and seven years after his death, on complying with the provisions of the Act (see *infra*, p. 308); so that a print may be protected, both under the earlier Acts and under the Act of 1862, provided it is copied from a drawing or design in which there is copyright (*Tuck*, 1882, 51 L. J. (N. S.) 363). If not (as in the case of an engraving of an old picture), there can only be copyright under the earlier Acts; and of course in this case there is only copyright in the engraving. There is no monopoly of copying the subject (*De Berenger*, 1819, 2 Stark. 548). According to the principles laid down for books, all may go to a common source (see *Kenrick*, 1890, L. R. 25 Q. B. D. 99). But one must not copy the work of another (*Blackwell*, 1740, 2 Atk. 92).

To obtain the benefit of the Engraving Acts, the print must be engraved, etched, drawn, or designed (Act 1777, s. 1: *Page*, 1832, 5 Sim. 395; 6 & 7 Will. IV. c. 59; *Jefferys*, 1854, 4 H. L. Rep. 815), and first published in the British dominions (7 & 8 Vict. c. 12, s. 19; 49 & 50 Vict. c. 33, s. 8). The date of first publication of the print, and the name of the proprietor, must be engraved on the plate, and printed on every print (Act 1734, s. 1; *Newton*, 1827, 4 Bing. 234).

The purchasers of plates may reproduce without incurring penalties (1734, s. 2; but see *Cooper* (1895), 1 Ch. 567; *Hole*, 1879, L. R. 12 Ch. D. 886, 898).

How far has one employing another to engrave for him the copyright in the work executed? The summary of the law given above covers cases of employment in which the employer is the inventor or designer, or where he has caused a print from any picture, drawing, model, or sculpture to be made. But it does not cover any other case, as, *e.g.*, the execution of an engraving on commission from the engraver's own design (see *Jefferys*, 1753, Amb. 163; *Stannard*, 1871, 24 L. T. (N. S). 570). In the latter case, should an employer be desirous of acquiring the copyright, he would require to take advantage of the provisions of the Act 1862, s. 1 (see *infra*, p. 309).

Maps, charts, and plans come under both the Engraving Acts and the Copyright Act of 1842. To preserve the fullest rights, it is necessary to register under the Act of 1842, but this only before raising an action (s. 24) (see Copinger, p. 407; *Stannard* v. *Lee*, 1871, L. R. 6 Ch. 346; *Stannard* v. *Harrison*, 1871, 24 L. T. (N. S.) 570). If a print is part of a book, it is protected by the Act of 1842, and does not require to have the name and date printed on it (*Bogue*, 1852, 5 De G. & Sm. 267).

For assignation of copyright in a print, writing is not required. But if assignation or consent is pleaded in defence to an action of damages, a written assignation or consent, attested by two witnesses, must be produced (1776, s. 1).

Infringement.—The test of infringement seems to be whether the mode of copying depreciates the commercial value of the print (see *Moore*, 1842, 9

M. & W. 692; *Gambart*, 1863, 14 C. B. (N. S.) 306; *Dicks*, 1880, L. R. 15 Ch. D. 22). Infringement of copyright in a print must be distinguished from infringement of the design (*Dicks*). It is a question how far copying by hand is an infringement (*ib.*). The prohibition against infringement contained in the Acts is too extensive to be quoted. It includes copying "in whole or in part, by varying, adding to or diminishing from, the main design," and also comprises selling or importing for sale (1735, s. 1; 1776, s. 1). The former Act, in connection with selling or importing, contains the word "knowingly." This might make a difference if penalties were sued for.

Remedies for Infringement.—(1) Interdict. (2) Action of damages. (3) Action for penalties. The penalties are enumerated, 1736, s. 1, and may be sued for by anyone, either in the Court of Session or by a summary action in the Sheriff Court (1862, s. 8). In the latter case, the evidence of one witness is sufficient to convict, and the Sheriff's judgment is final. In an action of damages, it is necessary to specify the *locus* of the infringement (*Graves*, 1868, 7 M. 204). An action for penalties must be brought within six months (1766, ss. 6 and 8).

(*b*) *Paintings, Drawings, and Photographs.*

Statute.

25 & 26 Vict. c. 68 (The Fine Arts Copyright Act, 1862).

Copyright in paintings, drawings, and photographs, apart from the rights conferred by the Engraving Acts, exists only by virtue of the above Statute. It is conferred (s. 1) on the author (and his assigns), being a British subject *or* resident within the dominions of the Crown, of every original painting, drawing, and photograph made either in the British dominions or elsewhere, not sold or disposed of before 29th July 1862. Its term is the LIFE OF THE AUTHOR AND SEVEN YEARS after his death. It means the "exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof, by any means and of any size" (s. 1). The word author is used in this Act to designate the artist or maker of a painting, drawing, or photograph. This use, strongly condemned by Brett, M. R., in *Nottage* (1883, L. R. 11 Q. B. D. 627, at p. 631), leads to difficulty in determining who is the proprietor of copyright in a photograph. Who is the "author" of a photograph? In *Nottage* (*supra*), it was held that the members of a firm who employed a large staff of assistants, and did not take the photographs themselves, were not the authors. In *Melville* ((1895) 2 Ch. 531), Kekewich, J., held that a person who generally controls the operation is the author, and that one who performs the manual operations under his control is not. There is a saving in the Act of the right of any person to copy a work in which there is no copyright, notwithstanding that someone else has made a copyright copy of it (s. 2). Copyright is personal or moveable estate (s. 3). A register book is kept at Stationers' Hall, entitled the Register of Proprietors of Copyright in Paintings, Drawings, and Photographs (s. 4); and the enactments in the Copyright Act, 1842 (ss. 11, 12, 13, 14), with relation to the book—inspection of it, searches, copies, using entries as evidence, and the expunging and varying of entries—are applied to it (s. 5). Differing from the Act of 1842, registration is necessary to entitle any proprietor of copyright to the benefit of the Act, and no action is sustainable in respect of anything done before registration (s. 4). In *Tuck* (1887, L. R. 19 Q. B. D. 629), it was held that, although by the operation of sec. 4 damages could not be recovered for

the *making* of unauthorised copies *before* registration, yet they could be recovered for the *sale* of those copies after registration.

Copyright exists before registration, and is capable of assignation. Assignation does not require registration to completely invest the assignee (ss. 1, 3, 4; *Graves'* case, 1869, L. R. 4 Q. B. 715). A licensee does not require to register (*Tuck*, 1882, 51 L. J. Q. B. 363). The entry, if the author has not parted with the copyright, is his name and place of abode, with a short description of the nature and subject of the work, and, if he so desire, a sketch, outline, or photograph of it For what is requisite as a description, see *ex parte Beal*, 1868, L. R. 3 Q. B. 387; *Graves'* case, *supra*. If the owner of the copyright is not the author, the entry requires the date of the assignment of the copyright, with the names of the parties thereto, the name and place of abode of the proprietor of the copyright, the name and place of abode of the author of the work, a short description of the nature and subject of the work, and, if the person registering so desire, a sketch, outline, or photograph of it (s. 4). The fee for making an entry is 1s. (s. 5).

The effect of the first sale of a work upon the copyright in it requires special attention. If a painting, drawing, or the negative of a photograph is executed on commission (the words are "shall be made or executed for or on behalf of any other person for a good or a valuable consideration"), the copyright is the property of the person on whose behalf it is executed, unless at or before the time of sale or disposition it is expressly reserved to the author by agreement in writing, signed by the person on whose behalf it is executed. If it is an ordinary sale (for the first time), the copyright does not belong to the vendor, unless it is expressly reserved to him in writing signed by the vendee: and it does not belong to the vendee unless an agreement in writing signed by the vendor, or his agent duly authorised, is made to that effect. The consequence, apparently, is that in an ordinary sale, unless writing passes, the copyright is irretrievably lost (s. 1). Such is the reading of the section adopted by Sir James Stephen in *Digest Copyright Commission Report*, article 21, p. lxxvi, and is the opinion of Copinger (p. 441) and Scrutton (p. 182). So far as regards execution on commission, this is undoubtedly a correct reading: but in the case of an ordinary sale it is not quite so clear. The provision for the case of an ordinary sale, however construed, involves a contradiction (see *Levi*, 1887, 3 T. L. R. 286). In the case of a photograph, where the sitter pays for the copies, he has the copyright (*Pollard*, 1889, 40 Ch. D. 345. This case decided on ground of breach of trust). Where the sitter pays nothing, the copyright is the photographer's (*Melville* (1895), 2 Ch. 531). Every assignation of copyright, and every licence to use or copy a copyright design or work, must be in writing, signed by the proprietor of the copyright, or by his agent appointed for that purpose in writing (s. 3). There may be partial assignment of copyright, so as to give the right to copy in one particular size: and the right to reproduce in other fashions remains in the assignor (*Lucas*, 1880, L. R. 13 Ch. D. 872).

Infringement of copyright is to "repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution," any copyright work, or the design thereof, or cause the same to be done, or, knowing that any copy has been unlawfully made, to import into the United Kingdom, or to sell, publish, let to hire, exhibit or distribute, or offer to do so, or cause the same to be done. (These are the provisions of sec. 6, expressed shortly.) The penalty is £10 for every such offence, and the pirated copies and the negatives of photographs are forfeited to the proprietor of the copyright

(s. 6). Penalties cannot be exacted for anything done abroad (*Tuck*, 1887, 19 Q. B. D. 629).

Copying is an infringement, whatever the size of the copy may be, or whatever the means used (s. 1) (*Bradbury*, 1872, L. R. 8 Exchr 1). It is to be observed that copying the design is an infringement (ss. 1, 6). "In all cases where the alleged invasion is not a mere copy, the Statute makes it imperative to consider how far there is identity of design" (per Ld. Watson in *Hanfstaengl* v. *Baines & Co.* (1895), A. C. 20, at p. 27). Copyright in a design does not extend so far as to make it an infringement of the design of a picture to represent the picture by a *tableau vivant*, formed by living persons dressed in the same way and placed in the same attitudes as the figures in the picture (*Hanfstaengl* v. *Empire Palace* (1894), 2 Ch. 1). But copyright extends to the painted backgrounds of the *tableau* (*ib.* (1895), W. N. 76). A photograph or drawing of the *tableau* might be an infringement of the copyright in the picture (*Hanfstaengl* v. *Baines* (1895), A. C. 20). It is a question of fact whether it is or not. A drawing may be a copy of the work of another though it has not been made directly from that work itself, but by the use of intermediate copies or other indirect means (per Ld. Shand in *Hanfstaengl* (1895), A. C. at p. 30; cf. *Turner* v. *Robinson*, 10 Ir. Ch. 121, 510). Importation of pirated copies or negatives of photographs is forbidden by the Act; and if the proprietor of copyright declares that any goods imported are infringements of his copyright, such goods may be detained by the officers of customs (s. 10).

A penalty of £10, or double the price of all copies, with forfeiture of copies, is exacted from any person convicted of: (1) fraudulently signing or affixing to any work any name, initials, or monogram; (2) fraudulently selling, publishing, or exhibiting, or otherwise disposing of or offering for sale, etc., a work with any such name, etc.; (3) fraudulently uttering, disposing of, or putting off, or causing to be uttered, etc., any copy or imitation of a work, whether copyright or not, as the original work; (4) knowingly selling, or publishing, or offering for sale, during the life of the author, any work, or copies of a work, which has been altered without the author's consent, as the unaltered work of the author: provided that in all these cases the person whose name, initials, or monogram is fraudulently affixed, or whose work is altered, or to whom a work is falsely ascribed, is living at the time, or within twenty years of the time, of the commission of the offence (s. 7). Pecuniary penalties and forfeited copies may be recovered by action in the Court of Session, or summary action in the Sheriff Court. In the latter case, the evidence of one witness is sufficient for a conviction, and the Sheriff's judgment is final (s. 8). A person whose copyright is infringed has an action of damages in addition to an action for penalties (s. 11). There is no time fixed by this Act within which actions must be brought. In the application of the law relating to paintings, drawings, and photographs, the same general principles as apply to books and engravings are in force. The right of several persons to go to a common source is specially preserved by sec. 2.

(c) *Sculpture.*

Statute.

54 Geo. III. c. 56 (The Sculpture Copyright Act, 1814).

Copyright in sculpture was introduced by 38 Geo. III. c. 71. This Act was superseded by the Act of 1814, and was repealed by the Statute Law Revision Act, 1861.

The first section of the Act of 1814, granting the right and defining the

subject of it, is too long to quote, and it cannot be summarised. It defies reasonable construction, as it is quite ungrammatical and almost unintelligible (see Sir James Stephen in *Dig. Cop. Com. Rep.* p. lxxv.). As far as the section can be understood, it confers "the sole right and property in any new and original sculpture, or model, or copy, or cast" of the human figure or of any animal, or of "any subject being matter of invention in sculpture," upon the person who makes such things or causes them to be made, for FOURTEEN YEARS from "first putting forth or publishing the same," WITH A FURTHER TERM OF FOURTEEN YEARS to the maker if he be alive at the end of the first term, provided that in every case the maker ("proprietor" in the Act) put his name with the date upon the sculpture before it is put forth or published (ss. 1 and 6). The section instructs the proprietor to put "the date" upon the sculpture, but does not indicate what date. Probably the date of publication is intended. The making or importing, or causing to be made or imported, or exposed to sale or otherwise disposed of, any pirated copy of the things enumerated in the first section, subjects the offender to an action of damages (s. 3). Assignation of copyright must be by tested deed (s. 4). Actions for any offence must be raised within six months after the discovery of the offence (s. 5). The period when copyright commences is the "first putting forth or publishing." What this exactly means has not been decided (see *ante*, p. 306). Publication was defined by the Lord Chancellor of Ireland, in the case of sculpture, to be "when the eye of the public is allowed to rest upon it" (*Turner*, 1860, 10 Ir. Ch. at p. 516). But this statement was *obiter*, and is not easily reconcilable with the judgment. It is obviously difficult to determine a point of time when a piece of sculpture is "published." Must it leave the artist's studio?

There is only one reported case under the Act of 1814 (*Caproni*, 1891, 65 L. T. (N. S.) 785). In this case, casts of models of natural fruits, showing artistic taste and judgment in the selection of the objects, and skill in the grouping, were found entitled to protection, as coming within the words "any subject being matter of invention in sculpture."

VI. COLONIAL COPYRIGHT.

Statutes.

5 & 6 Vict. c. 45, ss. 15, 17, 29 (The Copyright Act, 1842).
10 & 11 Vict. c. 95, ss. 1, 2 (The Colonial Copyright Act, 1847).
38 & 39 Vict. c. 53 (The Canada Copyright Act, 1875).
39 & 40 Vict. c. 36, s. 152 (Customs Consolidation Act, 1877).
49 & 50 Vict. c. 33, ss. 8, 9 (The International Copyright Act, 1886).

The Act of 1842 extends to every portion of the British dominions (s. 29). Provided the first publication of his work be in the British dominions, every British subject may acquire copyright whether he is resident in the British dominions or not (Act 1886, s. 8). Except the Act of 1842, none of the Copyright Acts expressly extends to all the British dominions.

By the Act of 1847, the Crown has power, by Order in Council, to dispense with the provisions of the Act of 1842, relating to the importation of foreign reprints into any particular British possession, when the legislative authority in that possession has made provision for securing or protecting the rights of British authors (s. 1). For Orders in Council and working of the Act, see Copinger, *Copyright*, p. 609. The next Act dealing with colonial copyright was the Act of 1875, which gave power to the Crown to assent to the passing of an Act by the Canadian Legislature regulating copyright in Canada. It is provided by the Act of 1875, that no book which becomes entitled to

copyright in Canada under the Canadian Act, shall be imported into the United Kingdom. This provision must, however, be read in the light of the extended copyright given to all the colonies by the Act of 1886 (*infra*).

The International Copyright Act, 1886, deals with colonial copyright. It enacts (s. 8) that all the Copyright Acts shall apply to a *literary or artistic* work first produced in a British possession in like manner as they apply to a work first produced in the United Kingdom. But it is provided that if the law of the possession provides for registration, registration under the Copyright Acts is unnecessary, and no copies of any book require to be delivered for libraries (s. 8 (1)). Where a register of copyright in books is kept in a British possession, an extract duly certified is admissible in all Courts in evidence of the contents of that register (s. 8 (2)). Where before 1886 any Act or Ordinance has been passed in any British possession respecting copyright, an Order in Council may modify the Copyright Acts, so far as they apply to such possession (s. 8 (3)). The right to pass any Act or Ordinance in any British possession, regulating copyright in works first produced in such possession, is preserved (s. 8 (4)). It is questioned if the Act of 1886 has extended the rights of the makers of works of art under the Act of 1862. The scope of the Engravings Copyright Acts and the Sculpture Copyright Act is certainly extended to works produced in the colonies; but it is contended that, as to works of art which come under the Act of 1862, that Act gives copyright to anyone resident within the dominions of the Crown, and nothing more is granted by the Act of 1886 (see Scrutton, p. 199; Copinger, p. 622).

VII. INTERNATIONAL COPYRIGHT.

Statutes.

*1844, 7 & 8 Vict. c. 12.
*1852, 15 & 16 Vict. c. 12.
1862, 25 & 26 Vict. c. 68 (s. 12).
*1875, 38 & 39 Vict. c. 12.
1876, 39 & 40 Vict. c. 36 (ss. 42, 44, 45, 152).
*1886, 49 & 50 Vict. c. 33.
1889, 52 & 53 Vict. c. 42 (s. 1).

* (The International Copyright Acts, 1844–1886.)

The regulation of copyright, and the rules for enforcing it, being the creature of statute, if copyright itself be not, the international law relating to copyright is the creature of treaty and statute following thereon. An American author (Curtis) says: "The actual law of nations knows no exclusive right of an author to the proceeds of his work, except that which is enforced by the municipal law of his own country, which can operate nowhere but in its own jurisdiction. As soon as a copy of a book is landed in any foreign country, all complaint of its republication is, in the absence of a treaty, fruitless, because no means of redress exist, except under the law of the author's own country. It becomes public property, not because the justice of the case is changed by the passage across the sea or a boundary, but because there are no means of enforcing the private right" (*Copyright*, p. 22). (See also opinion of Ld. Coalston in *Hinton* v. *Donaldson*, 1773, Boswell's *Report*, p. 29.)

The Acts given above contain all the Statute law on the subject of international copyright; but for the actual rules regulating international copyright, the Orders in Council, issued in pursuance of these Acts, must be consulted. A list of them will be found in the *Law Reports Digest*, *sub voce* "Copyright, International." The Acts marked * are the International

Copyright Acts, and are to be construed together (Act 1886, s. 1). By these Acts the Queen, by Order in Council, may grant copyright (including the right of representation of dramatic pieces and musical compositions) to authors of books, and inventors, designers, engravers, and makers of works of art, first published in foreign countries: and the several Statutes applying to the different classes of works thereafter apply to such foreign authors and their works, save as the Order in Council may limit their application (Act 1844, ss. 2, 3, 4, 5; 1886, ss. 2 (1), 10). The Acts, or any Order thereunder, cannot confer a greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced (1886, s. 2 (3)). See, for what is "a greater right," Scrutton, p. 205, and *Hanfstaengl* v. *Empire Palace* (1894), 3 Ch. 109, 123). Before making an Order in Council in respect of any foreign country, Her Majesty in Council is to be satisfied that that foreign country has made such provisions (if any) as it appears to Her Majesty expedient to require for the protection of British authors (1886, s. 4). The regulations as to the registry and delivery of copies of works (1844, ss. 6–9, 11, 12) do not apply, except so far as provided by the Order (1886, s. 4; *Hanfstaengl* v. *American Tobacco Co.* (1895), 1 Q. B. 347).

The importing of copies of copyright books printed in foreign countries other than those wherein the books were first published, or unauthorised translations, is prohibited, and pirated copies may be seized and destroyed (1844, s. 10; 1852, s. 10; 1886, s. 5. But see Pitts, 6 Nov. 1896, 13 T. L. R. 20). In the case of translations, the right of preventing the publication or importation only subsists for ten years, unless during that period an authorised English translation has been produced (1886, s. 5 (2)). There is no copyright in any work first published out of the British dominions other than that given by the International Copyright Acts (1844, s. 19. See *Boucicault* v. *Delafield* (1863), 1 Hem. & M. 597; *Boucicault* v. *Chatterton* (1876), 5 Ch. D. 267). An Order in Council may regulate the production of imitations or adaptations of a dramatic piece or musical composition published in a foreign country (1852, s. 6; 1875, s. 1). To copy or translate an article of political discussion from a foreign newspaper or periodical, if the source be acknowledged, is not an infringement of copyright. The same holds good of *any* article, unless the author has signified his intention of preserving the copyright (1852, s. 7). In certain circumstances, the publisher and not the author may have copyright in a work (1886, s. 2 (2)). An Order in Council applies to works produced before the date of the Order (1886, s. 6. See *Hanfstaengl* v. *Holloway* (1893), 2 Q. B. 1; cf. *Lauri* (1892), 3 Ch. 402, and Scrutton, p. 208). It is provided, however, that where any person has, before the date of the Order, lawfully produced a work in the United Kingdom, any rights or interests connected with such production, which are subsisting and valuable, are not to be diminished or prejudiced (*ib.*). For the construction of "rights and interests," see *Moul* (1891), 2 Q. B. 443; *Schauer* (1893), 1 Ch. 35; and *Hanfstaengl* v. *Holloway*, *supra*.

The existence or proprietorship of foreign copyright may be proved by a duly authenticated extract from a register or a document stating the existence of copyright, and such documents are admissible in evidence in all Courts (1886, s. 7).

The International Copyright Acts apply to all British possessions, but the Queen in Council may declare that the Acts, or any Order in Council, are not to apply to a particular British possession (1886, s. 9).

Provision is made by sec. 3 of the Act of 1886 for the determination of copyright when a work is produced simultaneously in two or more countries.

The Act of 1886 was passed, as its preamble bears, to enable the Queen to assent to a Convention, called the Berne Convention, which was finally ratified 5 Sept. 1887. This Convention embraces a number of countries, formed into the International Copyright Union. An Order in Council was issued 28 Nov. 1887, adopting and embodying the Berne Convention (see Scrutton, p. 283; Copinger, p. cxxiii.). Other Conventions have since been entered into, and other Orders in Council issued in regard to them and to the accession of other countries to the International Copyright Union. For these, see *Law Reports Digest, sub voce* "Copyright, International." The rights of foreigners to copyright in the British dominions are now regulated by these Orders in Council, under the International Copyright Acts. The rights of British subjects to copyright in any foreign country are regulated by the law of that country, whether it is a party to any Convention with Great Britain or not. Any person seeking to restrain an infringement in a foreign country comprised in the International Copyright Union, even though the defender be a British subject, must have recourse to the Courts of that country (*Morocco-Bound Syndicate* (1895), 1 Ch. 534).

[On the whole subject of copyright, see Copinger on *Copyright*; Scrutton on *Copyright*; Shortt, *Law of Literature and Art*; *Report of the Copyright Commission*, 1878, *with Appendix—Digest of the Law of Copyright*, by Sir James Stephen.]

For Copyright in designs, see PATENTS, DESIGNS, and TRADE MARKS.

Corn.—Growing corns, after they have reached a certain growth, are held to be moveable, and therefore subject to the diligence of poinding. The prices and quantities of corn, it has been held, are as capable of being fixed before their separation from the ground as afterwards (Ersk. *Inst.* iii. 6. 22; Rankine, *Leases*, 565, and cases there cited). But diligence can only competently be used when the corn is ripe or nearly so; and it is only completed by severance of the corn from the ground (*E. Morton*, 1765, M. 6197). Poinding in December of wheat just brairded, and of grass sown for a crop next season, has been held ineffectual (*Elder*, 1833, 11 S. 902; *Dun*, 1818, Hume, 451). A landlord with a right of hypothec over a farm enjoys a preference over the poinding of corns used by creditors of his tenant.

A purchaser who had obtained symbolical delivery of corn, was preferred to the creditors of the seller (*B. C.* i. 187). See POINDING; THIRLAGE; HYPOTHEC.

Corporation.—See INCORPORATION — JOINT STOCK COMPANY; PARTNERSHIP; BURGH.

Corporation Duty is the familiar name for a duty imposed by the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), upon property which, because vested in, or belonging to, bodies corporate or unincorporate, escapes the usual death duties. It is made leviable and payable to Her Majesty in respect of all real and personal property which shall have belonged to, or been vested in, any such body during the yearly period ending 5th April 1885, or during any subsequent yearly period ending on the same day in any year. The duty is at the rate of £5 per cent.,

and is chargeable upon the annual value, income, or profits of such property. The deductions allowed include all necessary outgoings, the receiver's remuneration, and the costs of management properly incurred (s. 11). In the printed form of return supplied, on application to the Secretary (Stamps), Somerset House, London, by the Commissioners of Inland Revenue, deduction is allowed of ground-rent and mortgage and debenture interest, in both cases without deduction of income tax: insurance premiums, so far as the structure itself is concerned; the cost of repairs, not exceeding £10 per cent. of the annual value or rental; and the expenses incurred in realising the income returned for assessment. Further, it has been held in Scotland that allowance must also be given for land tax and landlord's rates (*Society of Writers to the Signet*, 1886, 14 R. 34).

Sec. 11 enacts the following exemptions:—(1) Property vested in or under the control or management of "The Commissioners of Her Majesty's Works and Public Buildings," or "The Commissioners of Her Majesty's Woods, Forests, and Land Revenues," or any department of Government. (2) Property which, or the income or profits whereof, shall be legally appropriated and applied for the benefit of the public at large, or of any county, shire, borough, or place, or the ratepayers or inhabitants thereof, or in any manner expressly prescribed by Act of Parliament. (3) Property which, or the income or profits thereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts. (4) Property of any friendly society or savings bank established according to Act of Parliament. (5) Property belonging to or constituting the capital of a body, corporate or unincorporate, established for any trade or business, or being the property of a body whose capital stock is so divided and held as to be liable to be charged to legacy or succession duty. (6) Property acquired by or with funds voluntarily contributed to any body, corporate or unincorporate, within a period of thirty years immediately preceding. (7) Property acquired by any body, corporate or unincorporate, within a period of thirty years immediately preceding, where legacy duty or succession duty shall have been paid upon the acquisition thereof.

By the interpretation clause (s. 12), the term "body unincorporate" includes every unincorporated company, fellowship, society, association, and trustee, or number of trustees, to or in whom respectively any real or personal property shall belong in such manner, or be vested upon such permanent trusts, that the same shall not be liable to legacy duty or succession duty.

The words "legally appropriated" in exemptions (2) and (3) mean that "the property is so appropriated as to create a legal obligation upon the part of the administrators of the property to apply it in a particular manner . . . . When there is a legal obligation, it follows again, as a matter of necessity, that there must be somewhere a legal right to enforce the obligation" (*Incorporation of Tailors in Glasgow*, 1887, 14 R. 729, *per* L. P. Inglis; see also *Linen and Woollen Drapers', etc., Institution*, 58 L. T. R. 949, *per* Hawkins, J.).

The words "charitable purpose" in exemption (3) have been the subject of decision in the two cases last cited, and in *Scott, in re Bootham Ward Strays, York*, L. R. [1892], 2 Q. B. 152. In the first case, a fund, created by the contributions of persons on becoming members of the corporation, was legally appropriated to one purpose only,—that of providing for the decayed members and their widows and children. What they received, they received of right as the fruit of a payment made: and the

Court held that the purpose was not charitable, charity, in the ordinary sense, meaning gratuitous bestowal upon one who has no right to demand anything from the giver. These views were confirmed in the subsequent cases cited above, in the latest of which it was pointed out that the words bear a more restricted meaning in this than in the Income Tax, Act (see *Pemsel*, L. R. [1891] A. C. 531). Since *Pemsel's* case the duty is not in practice charged in the case of corporations such as that of the Glasgow Tailors.

The words "for the promotion of education, literature, science, or the fine arts," in exemption (3) have been the subject of consideration in *Society of Writers to the Signet, ut supra*, and *Forrest, in re Duty on Estate of Institution of Civil Engineers*, L. R. 19 Q. B. D. 610; 20 Q. B. D. 621; 15 A. C. 334. Where the property or income is, if not exclusively, yet certainly in the main, and as its chief object, devoted to the promotion of education, literature, science, or the fine arts, it will fall within the exemption. It is otherwise where the professional advancement of the corporators is the primary purpose.

As to exemptions (4) and (5), see *in re Duty on Estate of Law Reporting (Incorporated Council of)*, L. R. 22 Q. B. D. 279, where it was held that the undertaking was established for a trade or business within the meaning of exemption (5), although no part of the property or income could be paid as dividend, bonus, or otherwise to any member. In practice, life assurance societies are treated as falling under this exemption.

The words "voluntarily contributed" in exemption (6) were considered in *Society of Writers to the Signet, ut supra*, and *in re Duty on Estate of New University Club*, L. R. 18 Q. B. D. 720; see also *Forrest, in re Duty on Estate of Institution of Civil Engineers, ut supra, per* Ld. Watson. In the sense of the Act, money "voluntarily contributed" is money gifted,—gratuitously given,—given not under contract,—given not as condition of a benefit to be received.

The "accountable officer" is the receiver, or possessor, or controller of the income on profits of the bodies in question (s. 12). The duty is a stamp duty, and is under the care and management of the Commissioners of Inland Revenue, who have the same powers of collection, recovery, and management as under the Succession Duty Act, 1853 (see LEGACY AND SUCCESSION DUTIES), and all other powers necessary for making this duty effectual (s. 13). The duty shall be a first charge on the property while in the possession or control of the chargeable body, or of anyone acquiring the same, with notice of such duty being in arrear; and the body as well as the accountable officer is answerable for payment (s. 14). Every chargeable body shall, on or before the first day of October in every year, deliver a full and true account of its dutiable property, and of the gross annual value, income, or profits thereof in the year ended on the preceding fifth day of April, and of all deductions claimed in respect thereof, whether by relation to any of the before-mentioned exemptions or as necessary outgoings. The account shall be made in such form, and shall contain such particulars, as the Commissioners shall require, or as shall be necessary for the ascertainment of the duty; and every accountable officer shall be bound to deliver such full and true account (s. 15; cf. *in re Duty on Estate of New University Club, ut supra*, with *in re Duty on Estate of Law Reporting (Incorporated Council of), ut supra*). The accountable officer may pay the duties and all reasonable expenses out of any moneys held by him as such officer (s. 16). If dissatisfied with the account rendered, the Commissioners may cause an account to be taken by a person appointed by themselves, and may assess thereon, subject to appeal (see s. 19, *infra*). Provision is made for the expenses of such account. The duty shall be payable immediately after the assessment,

notwithstanding any appeal therefrom. If the Court reduce the assessment, the difference in amount shall be repaid with such interest (if any) as the Court may allow (s. 17). A penalty of £10 per cent. on the duty found to be payable, is imposed for not making returns before the first day of October; and a like penalty is incurred by wilful neglect to pay the duty for twenty-one days after it is payable, and for every month thereafter during which such neglect shall continue (s. 18). The Commissioners have the same powers as under the Succession Duty Act, 1853 (see LEGACY AND SUCCESSION DUTIES), in relation to the delivery and verification of accounts and the production and inspection of books and documents (s. 19 (1)). In the case of any proceedings in any Court for the administration of any dutiable property, the Court shall provide out of any such property in its possession or control for payment of the duty (s. 20). Every body, if dissatisfied with the assessment of the Commissioners, may avail itself of the provisions of the Succession Duty Act, 1853, as to appeal (s. 19 (2)). The provision to which reference is made is contained in sec. 50 of the said Act, and the procedure, in Scotland, is by petition and appeal to the Inner House of the Court of Session, sitting as the Court of Exchequer. The Court order service on the Commissioners, or on the Solicitor of Inland Revenue for Scotland on their behalf, ordaining them or him to lodge answers thereto within eight days. The procedure thereafter is the same as in an ordinary Court of Session petition: and an appeal lies to the House of Lords from the judgment of the Inner House (Jackson, *Corporation Duty*, 114). Proceedings taken by the Crown for enforcing delivery of accounts and payment of duty are regulated by the Court of Exchequer (Scotland) Act, 1856 (19 & 20 Vict. 56).

[See Jackson, *Corporation Duty*, 1892.]

Corporeal and Incorporeal.—This division of "res," as the subjects of rights, into corporeal and incorporeal, was adopted by the Roman jurists, and it has been followed in the law of England. "Things are," however, "by the law and usage of Scotland, either heritable or moveable" (Ersk. ii. 2. 3). See HERITABLE AND MOVEABLE. The division was probably imported into the Roman jurisprudence from the philosophy of the Stoics. Within the domain of philosophy the distinction is a natural and complete one. Cicero (Top. 5) defines the two classes as "unum earum rerum quæ sunt, alterum earum rerum quæ intelliguntur." Gaius (ii. 12) and, following him, Justinian (*Inst.* ii. 2. pr., and *Dig.* 1. 8. 1. 1) adopt the distinction in law. "Quædam præterea res corporales sunt, quædam incorporales. Corporales eae sunt, quæ sui natura tangi possunt . . . . Incorporales autem sunt, quæ tangi non possunt" (*Inst.* ii. 2 pr.). In the first place, it must be observed that the number of "res" coming within the legal category is of necessity much more limited than that embraced by the philosophical. There are many things in the physical world and in the world of thought which are not "res" in the legal sense at all. A "res" in the legal sense is the subject of rights. All corporeal objects which are incapable, from their nature, of being the subjects of rights are therefore excluded from the "res corporales" of the law. In the same way, many objects of the intelligence—res incorporales of Cicero—do not exist in law at all. The legal division, however, is very different from the philosophical. Both Gaius and Justinian fall into confusion over the ambiguous meaning of the word "res," and hence arises their illogical division. "Res," as Mr. Poste points out (Poste's Gaius, 3rd ed., p. 148),

means either a right or the subject of a right. Under "res corporales" they accordingly group every limited portion of volitionless matter which has not the legal attributes of a person, over which the right of dominium may be created by means of a real action. The concrete object of the right of dominium is a "res corporalis." They make dominium itself a "res corporalis." The rights of servitude, of usufruct, of obligation, on the other hand, they class as "res incorporales," although the indirect objects of those rights may, in most cases, be referred ultimately to "res corporales." The subject of a right of usufruct (a fundus) is the same as the subject of a right of ownership. The confusion between right and subject of right probably arose from the ancient formulæ, in which the intentio of a real action ran. If for dominium, it was "si paret illum fundum actoris esse"; if for usufruct, "si paret jus usufructus illius fundi actoris esse." A similar confusion occurs in English law, where "chattels" and hereditaments are sometimes used to denote the subjects of certain rights: sometimes the rights themselves. The division of "things," in the legal sense, is therefore into the two classes: (1) things which can be touched or apprehended by the senses, and over which dominium can be created by a real action, and therefore "dominium" itself; and (2) certain legal entities (*quæ in jure consistunt*), such as inheritance, usufruct, etc. Hunter (*Roman Law*, 2nd ed., p. 287) explains that the jurists were led to make this division "from the accident that ownership, in their law, was transferred by the delivery of the thing, whereas lesser rights than ownership were created in a different manner."

In English law, the distinction between corporeal and incorporeal hereditaments which still obtains, arose from a similar cause, and it is worthy of notice that "an estate for life" is classed among corporeal hereditaments, because such an estate was at one time created by livery of seisin.

The term "incorporeal rights" is used in Scotland to "comprehend *all jura ad res*, the *jus exigendi* in all obligations; and although incapable, in one sense, of possession, they are vested by the completion of the *jus exigendi*, and form, when so vested, a part of the moveable or personal estate. Such are: debts, Government funds, bank stock, patents, and copyright" (Bell, *Prin.* 1338).

Corpse.—See Dead Body.

Corpus delicti.—The *corpus delicti* is the essence or necessary part of the crime charged against a panel. Whatever is set forth in the libel must amount to a crime, and the libel must be dismissed as irrelevant if the *corpus delicti* is not clearly apparent. Unless the essentials of the crime be proved, no conviction can be made. The question as to what is requisite to prove the *corpus delicti* has been the subject of decision under most branches of crime, a few of the leading of which we shall set forth merely as examples.

Homicide.—It must be proved that the victim died from the injury libelled. In the case of *James Mitchell* (9 Jan. 1678, Hume, i. 182), a libel which only charged the panel with inflicting extensive bodily injury was held irrelevant as a capital charge. Again, it must be proved that the injury was the direct cause of death. Thus, if a person receive a slight wound, and by his own neglect or misconduct aggravate it to a

mortal one, the inflicter cannot be convicted of murder (Hume, i. 182). So too, if even maliciously, but without the intention of doing murder, a person be the cause of the death of another who is otherwise in a moribund condition, he will not be convicted of murder (*William Duff*, 10 and 17 Nov. 1707, Hume, i. 183). Where, on the other hand, a deliberate murderous attack is made, it is no defence that the victim was in the last stage of a mortal disease, or was dying at any rate (*Jean Ramsay*, 12 and 24 Mar. 1713, Hume, i. 183). The fact that the wound might have been cured, is no defence to the charge of murder, unless, as before mentioned, it was not originally a dangerous wound, and that it only became so by neglect, or *ex malo regimine*. If a man receive a gunshot wound in the country, and die before assistance can be had, or if a man be robbed and beaten and left exposed in severe weather, and so dies, it is undoubtedly murder (Hume, i. 184). In those cases the injury inflicted was, taken along with the unfavourable circumstances, the immediate cause of death. Cf. the case of *M'Millan* (17 Dec. 1827, Hume, i. 184, note), where death arose from bleeding the arm to allay fever occasioned by sulphuric acid being thrown in the face. Here the injury was not the direct cause of death.

Rape.—To obtain a conviction under a charge of rape, it must be proved that there has been penetration of the person. If the victim be over twelve years of age, it must have been forcible and against her will. In the case of an adult woman, resistance must have been to the utmost. If she yield consent, no matter how she has been subdued, it is not rape (Hume, i. 308, note; Macdonald, *Crim. Law*, p. 167; see also under RAPE).

Theft.—Theft consists in the felonious taking and appropriation of property without the consent of the owner or custodier (Macdonald, *Crim. Law*, p. 18). To constitute the *corpus delicti*, it must be proved that the panel had no right to the subject stolen, not even a right by loan or pledge, unless they be only for a specific time or purpose (Macdonald, *Crim. Law*, p. 40). The object stolen must be the property of someone, *e.g.*, wild animals cannot be stolen, unless domesticated or confined. It is theft to steal from anyone, whether he be the owner or not, and even if he be in illegal possession of the object. The *corpus delicti* is not made out if an article be taken under colour of a title, as, *e.g.*, in poinding (Hume, i. 73, 74). There must be intent to deprive the owner of his property. Thus it is not theft to take the use of an article, *e.g.* a boat or a plough (Macdonald, *Crim. Law*, p. 24). Theft need not be for gain. It is theft if a thing be taken and destroyed or lost from malice. Once committed, theft is established, and repentance and restoration do not cancel it (see Macdonald, *Crim. Law*, pp. 18–25). See also under THEFT.

Reset.—The *corpus delicti* of reset consists in knowingly receiving articles dishonestly come by. It is not made out if nothing more than suspicion be proved (Hume, i. 114, and note), nor if the property be not actually received (Hume, i. 113), and it is not enough to harbour the criminal (Hume, *ib.*, etc.). See under RESET.

Robbery.—The essentials of this crime lie in the fact that violence must be used, whether actually or by menace. It need not be applied to the person: it is sufficient that it creates fear. It need not have been originally intended: it is sufficient if it arise in resistance. It is likewise robbery if appropriation arise as an afterthought during a struggle. If the violence is by menace, it must be of present injury. The property must be truly taken. Mere *amotio* is sufficient (see Macdonald, *Crim. Law*, 51–6: see under ROBBERY).

(For the *corpus delicti* in other crimes, see under various branches,

e.g. PERJURY; FORGERY; FIRE-RAISING; CHILD-MURDER; CONCEALMENT OF PREGNANCY, etc. Also see Hume, Alison, Macdonald.)

The *corpus delicti* has been sometimes proved by witnesses after confession (case of *Margaret Hamilton*, 1665, and others, Hume, ii. 320), but such a course is neither necessary nor customary. It may be followed in exceptional circumstances *ob majorem cautelam*. In libels for fire-raising, it used to be customary to allow greater latitude in setting forth the circumstances; for, especially if the subjects be destroyed, the *corpus delicti* can only be established by presumptions (Hume, ii. 192). Similarly, in cases of child-murder, owing to the facility of doing away with a child's life, and the difficulty of determining the precise manner of its death; and in certain cases of murder, where the details could only be known to the perpetrators themselves, a greater latitude is allowed (Hume, ii. *ib.*). It may be said generally, that in such cases the *corpus delicti* may be proved by less direct and conclusive evidence than would be requisite in cases which admitted of fuller proof. Under the old form of libel, it was necessary to set forth very minutely the precise circumstances of the offence libelled. The Criminal Procedure (Scotland) Act, 1887, has shortened this, but it has not done away with the necessity of supplying the prisoner, in the indictment, with precise information as to the nature of the charge brought against him, In the case of forgery, perjury, or incendiary letter, a description of the instrument must be given, because it itself is the *corpus delicti* (Hume, ii. 391).

Corpus juris.—The various compilations of Roman jurisprudence (*jus*) and statute-law (*leges*) which the Emperor Justinian caused to be made during his reign—the Institutes, the Digest or Pandects, the Code, and the Novels—have been regarded, ever since the revival of civil-law studies by the school of the Glossators at Bologna in the 12th century, as forming a complete body of law, and have been designated in their collected form the *Corpus Juris*, or, more fully, *Corpus Juris Civilis*, in contradistinction to the *Corpus Juris Canonici*, the collection of canon law formed by the mediæval canonists on the same model. Many manuscripts and printed copies of the *Corpus Juris* contain extraneous matter, *e.g.* the *glossæ* or notes on the text collected by Accursius, the Lombard feudal laws, etc. (see Savigny, *Gesch. des Röm. Rechts*, vols. iii. and iv.). The older editions have been superseded on all matters of textual criticism by the recent critical edition of the Digest by Mommsen, of the Institutes and Code by Krüger, and of the Novels by Schoell (Berlin, 1866–1896).

Correi debendi.—The Roman jurists made a threefold division of obligations in which there were more obligants than one, namely, into those *pro parte rata*, solidary, and correal. In an obligation *pro rata*, each of several debtors was liable only for his proportional share of the whole debt, and no more could be required of him. In this way it differed from an obligation of several *in solidum*, there being in the latter case as many debts as there were debtors, although satisfaction by one freed all, since it extinguished the single object of the obligation. A correal obligation has been defined as "a plurality of obligations based upon a community of obligation" (Sohm). Co-suretyship is an example of a correal obligation, joint delict of a solidary. In the latter there is no community of obligation although the object of it is one. In every obligation in which there were

several co-obligants, the presumption was that each was liable only *pro rata*; but this might be displaced by the nature of the object, *e.g.*, if it were indivisible, or by the intention of parties. A correal obligation was usually created thus:—the creditor asked one debtor: Do you promise to pay me 100 aurei? He then asked the next debtor: Do you promise to pay me the same 100 aurei? Each answered: I promise. The creditor might ask all together, using the plural verb "*spondetis*," to which all replied, "*spondemus*." But it might be created otherwise than by stipulation, *e.g.*, by testament, joint sale, hiring, mandate. Although each *correus debendi* owed the same debt, he did not necessarily owe it in the same way. One might be bound simply, another subject to a condition.

The effect of a correal obligation was that each co-obligant might be compelled to pay the whole or any part of the debt; payment by one operating *pro tanto* as a discharge to all. This result, at least where the obligation was created by stipulation, was effected also by *acceptilatio* to one co-debtor, by *novatio*, and, until Justinian, by *litiscontestatio*. Every method of extinction which related to the ground or subject of the obligation affected it for behoof of all the co-obligants.

Any one of the *correi* might be sued alone, but Hadrian gave to cautioners the right of compelling the creditor to call all the solvent co-cautioners; and this *beneficium divisionis*, already extended to co-tutors, was given by Justinian to all who were expressly bound by agreement for the whole sum. If one paid the whole debt, he had no relief against his co-debtors unless there was a partnership between them, or an agreement to that effect. But an *actio utilis* was sometimes given to the one who paid, to recover a proportional share from the other *correi*: and co-cautioners, co-tutors, and some others, were allowed the *beneficium cedendarum actionum*, a claim to an assignation of the right of action against his co-debtors.

Each correus was responsible for the culpa of the others, but *ad conservandam et perpetuandam obligationem* merely, not *ad augendam obligationem* (*Inst.* iii. 16; *Dig.* 45. 2; *Cod.* 8. 40).

For Scots law, see CONJUNCTLY AND SEVERALLY; CO-OBLIGANT.

Corroboration, Bond of.—See BOND OF CORROBORATION.

Corrupt and Illegal Practices is the name given to certain offences created by Statutes which have for their object the purification of the system of electing popular representatives by popular vote, either to sit in Parliament, or in town councils, county councils, parish councils, and school boards. The Corrupt Practices Acts are intended to apply to the details and management of such an election in such a way as to prevent entirely, or to render as difficult as possible, any influence of whatever kind, direct or indirect, being brought to bear on the independent voter for the purpose of influencing his vote. From the nature of the object aimed at, it is obvious that the provisions of these Acts are intricate and confusing, and that in many instances what is or is not an offence is a question of circumstances rather than a question of law. To a candidate, his agent, or indeed to any person having to do with the management of an election, these Acts are a constant source of anxiety and apprehension, for it may happen, and sometimes does, that, in spite of every care and every precaution, some act or thing may have been omitted or committed which, if it does not altogether void the election,

may lead to much trouble and expense. It cannot be said, therefore, that the Acts are satisfactory as they stand; and it is expected that within a short time fresh legislation will be introduced to render the present Acts, in certain respects, more intelligible, and the position of the candidate and his agent more secure.

The Statutes.—Although various attempts had been made previously to suppress and punish by Statute the corruption which prevailed at elections, it was not until 1854 that the first really important Corrupt Practices Prevention Act was passed (17 & 18 Vict. c. 102). That Act has been in several particulars amended by 21 & 22 Vict. c. 87, and 26 & 27 Vict. c. 29, by the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), and by the Ballot Act (35 & 36 Vict. c. 33). In 1883 a new Act was passed, incorporating and consolidating the provisions of the above recited Acts; and this Act—the Corrupt Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), with its amending Acts (48 & 49 Vict. c. 56, and 58 & 59 Vict. c. 40)—now regulates and controls all questions of corrupt and illegal practices at parliamentary elections. As regards corrupt and illegal practices at municipal, county or parish council, and school board elections, the Elections (Scot.) (Corrupt, etc.) Act, 1890 (53 & 54 Vict. c. 55), deals specially with them, and practically repeats, with a very few distinctions, the provisions of the 1883 Act dealing with parliamentary elections.

Before dealing with the main provisions of the Acts regarding corrupt and illegal practices, it may be useful to give a general summary of the offences by which a seat is forfeited.

A parliamentary election, upon petition, is avoided and the seat forfeited by—

(1) Any corrupt act committed by the sitting member *or any one of his agents*; or by

(2) Any of the illegal practices enacted by secs. 7 and 28 of the Act of 1883, committed by the sitting member, *or any one of his agents*; or by

(3) Any illegal practice enacted by the Act, committed by the sitting member, *or by his election agent*; or by

(4) General corruption *by whomsoever committed*; or by

(5) The employment by the candidate *personally* of an agent convicted of, or reported for, corrupt practices;

subject, in *some of these* cases, to the possibility of relief under secs. 22, 23, or 34 of the Act of 1883.

Similarly, a municipal or other election is avoided on the same grounds as above stated, substituting in (2) the appropriate sections of the 1890 Act, viz. secs. 8 and 9; in (3) omitting reference to the election agent; and in (5) substituting therefor altogether this ground of forfeiture—general prevalence of illegal practices, payments, etc., *by whomsoever committed* (s. 22).

Relief in some cases may be had under secs. 23, 24, 25 of the 1890 Act.

Corrupt Practices.

The expression "corrupt practice," as used in the Corrupt Practices Prevention Act, 1883, means any of the following offences: Treating, undue influence, bribery, personation, and the offence of making the declaration of expenses required by sec. 33 (7) of the C. P. P. A., 1883, falsely, and in the knowledge that it is false. Personation is anxiously defined in the Ballot Act, s. 24, and is incorporated in the 3rd Schedule of the 1883 Act.

Bribery is defined in secs. 2 and 3 of the 1854 Act (17 & 18 Vict. c. 102), and also incorporated in the same Schedule of the 1883 Act; while treating and undue influence are specially defined in secs. 1 and 2 of the C. P. P. A., 1883, itself.

There can be no corrupt practice without a corrupt intention. Illegal practices may be committed whatever the intention may be (*Walsall*, 1892, 4 O'M. & H. 123; *Barrow-in-Furness*, 1886, 4 O'M. & H. 77). Associations as such cannot be found guilty of corrupt or illegal practices. The offences complained of must be brought home to the committee or to the guilty individuals themselves (*Hexham*, 1892, 4 O'M. & H. 143; *Rochester*, 1892, 4 O'M. & H. 156). A corrupt practice may be committed at any time—before, during, or after an election (*Sligo*, 1869, 1 O'M. & H. 302; *Youghal*, 1869, 1 O'M. & H. 291; *Stroud*, 1874, 2 O'M. & H. 183; *Norwich*, 1886, 4 O'M. & H. 86). In *Hexham* (1892, 4 O'M. & H. 143), treating by the agent a year before the election voided it. The period during which a candidate can be held responsible for the illegal and injudicious acts of his recognised supporters must be confined within reasonable limits (*Walsall*, 1892, 4 O'M. & H. 123). In the circumstances of that case, the period began from the time when it was first known that Mr. James announced his intention to present himself as a candidate at the next ensuing election (per Mr. Justice Hawkins).

Bribery means directly or indirectly giving, lending, offering, promising money or reward, office, place, or employment to any person for the purpose of influencing votes; also procuring or promising to procure the return of any candidate, or the vote of an elector, in consequence of any such undertaking; also advancing money in the knowledge that it is to be spent in bribery; also directly or indirectly, before, at, or after an election, accepting money, reward, office, or employment for himself or others for voting or refraining from voting, or for having induced others to do so; also corruptly paying rates for the purpose of enabling a ratepayer to vote; and, in university elections, paying the registration fee of a member of the general council, to influence his vote (ss. 2 and 3, C. P. P. A., 1854; s. 2, Univ. Elect. Amd. (Scot.) Act, 1881: Sched. III. Part III. C. P. P. A., 1883). Bribery at a preceding municipal election (*Beverley*, 1869, 1 O'M & H. 143), or at a preceding parliamentary election (*Stevens* v. *Tillett*, 1870, L. R. 6 C. P. 147; *Stroud*, 1874, 2 O'M. & H. 107), may void a subsequent election: but the two elections must be connected (*Southampton*, 1869, 1 O'M. & H. 226; *Hastings*, 1869, *ib.* 217). Bribery at a test ballot voids the subsequent election (*Bristol*, 1870, 2 O'M. & H. 27: *Britt*, 1870, L. R. 5 C. P. 503).

The test of bribery is the motive of the briber (*Westminster*, 1869, 1 O'M. & H. 89). Effect of drunkenness as regards corrupt intention (*Montgomery*, 1892, 4 O'M. & H. 167, per Willes, J.). If the intention of the giver of a bribe is proved to be corrupt, the intention of the recipient is immaterial (*Hexham*, *supra*): and it is not necessary to give anything—an offer or promise is sufficient (*Kidderminster*, 1874, 2 O'M. & H. 170). Nor need the bribe be made or given directly. Giving money to children may be held bribes to their parents (*Southampton*, 1889, 1 O'M. & H. 223; *Stepney*, 1892, 4 O'M. & H. 38). A single act of bribery, whether the sum is large or small, avoids the election (*Norwich*, 1871, 2 O'M. & H. 41; *Blackburn*, 1869, 1 O'M. & H. 202; *Shrewsbury*, 1870, 2 O'M. & H. 37; *Pontefract*, 1893, 4 O'M. & H. 200): and the form it takes is immaterial. There is nothing, it seems, illegal in two voters pairing, *i.e.* one agreeing

not to vote if the other will not. The subject came up in the *Northallerton* case, 1869 (1 O'M. & H. 169). Colourable employment of voters for money is bribery, and avoids the election by whomsoever committed. As to what is colourable employment, see *Boston* (1880, 3 O'M. & H. 153), and cases referred to in the opinion of Lush, J., therein (*Oxford*, 1880, 3 O'M. & H. 155; *Ipswich*, 1886, 4 O'M. & H. 72; *Rochester*, 1892, 4 O'M. & H. 156).

As the number of persons legally employed for payment is strictly limited by the Act of 1883, any excess may lead the candidate into trouble. *Bonâ fide* employment of voters, provided the scale of remuneration is not excessive, is not a corrupt practice if committed by *any* agent (not the election agent). But it is an illegal practice if committed by the candidate or the election agent, and avoids the election. In all such cases the votes must come off on a scrutiny, and such payments would fall to be returned as election expenses (*Ipswich*, *supra*).

The following incidents and events have been held to constitute bribery:—Compensating a voter for loss of time (*Staleybridge*, 1869, 1 O'M. & H. 67; *Hastings*, 1869, 1 O'M. & H. 220; *Simpson*, 1869, L. R. 4 Q. B. 626); paying a substitute to do voter's work in absence (*Plymouth*, 1880, 3 O'M. & H. 107); travelling expenses to a voter (*Cooper* v. *Slade*, 1858, 6 H. L. C. 747; *Coventry*, 1869, 1 O'M. & H. 109; *Dublin*, 1869, 1 O'M. & H. 273; *Horsham*, 1876, 3 O'M. & H. 54; *Pontefract*, 1893, 4 O'M. & H. 201); a promise, permission, or privilege of value given to a voter, although no condition attached (*Launceston*, 1874, 2 O'M. & H. 129)—in that case it was permission to shoot rabbits; promise to give or vacate an office (*Waterford*, 1870, 2 O'M. & H. 25). In *Lancaster* (1896, 3 S. L. T. p. 241), an offer of work in the respondent's mills to the unemployed, made at a meeting of electors, was held in the circumstances not to amount to bribery. The doubt which formerly existed as to the legality of an employer giving a holiday to his workmen on the polling day, for the purpose of recording their votes, has now been removed by the Act 48 & 49 Vict. c. 56. The conditions on which an employer may give leave of absence to employees to record their votes without any deduction of salaries, are that the absence be for a reasonable time, that the privilege, so far as practicable, be given to all, that it be not given to induce a person to vote for any particular candidate, and that it be not refused so as to prevent a person from voting. It is not bribery, however, if the absence is longer than is reasonable, unless a corrupt intention to influence votes be also proved (*Aylesbury*, 1886, 4 O'M. & H. 60).

More difficult questions have arisen with regard to the "intentions" of a candidate who spends his money lavishly among the tradesmen of his constituency, or who distributes money, or goods in kind, as subscriptions and charities. Expenses *during* the election are firmly controlled by Statute, but there is nothing to prevent a candidate or the sitting member from spending profusely in the interval, in the hope of favours to come. To be a corrupt practice it must be done to influence a particular vote or votes, or the distribution must be dependent on political support (*Hastings*, 1869, 1 O'M. & H. 218; *Aylesbury*, 1886, 4 O'M. & H. 59). And the same principle applies in the case of subscriptions (*Westbury*, 1869, 1 O'M. & H. 49; *Belfast*, 1869, 1 O'M. & H. 282). In these cases, subscriptions were given to associations clearly for the purpose of winning popularity, and from no genuine charitable motive, yet the Court held that no act of bribery had been committed. See also *St. George's Division* (1869, 3 S. L. T. p. 276), where a subscription of £5 to a costers' union, to aid them

in a local agitation, was held not bribery. Subscriptions towards the expenses of a candidate are legal (*Belfast*, 1869, 1 O'M. & H. 285).

As regards *acts of charity*, these may be regarded by the Court as bribes, under the cloak of charity, and it is consequently prudent for the candidate to be doubly cautious on this head. In the *Youghal* case (1869, 1 O'M. & H. 294), the distribution of £340 in small sums among poor people, not voters, *the day before the poll*, was held not to be bribery But as the respondent there was unseated on other grounds, this opinion cannot be regarded as completely authoritative; and it has not been received with much favour in later cases, or by the leading text writers. In the second *Windsor* case (1874, 2 O'M. & H. 89), £100 distributed in coals, beef, and tea, long before the election, was not bribery. In the first *Windsor* case (1869, 1 O'M. & H. 2), the respondent ran a near chance of losing his seat by giving £1 to a distressed voter, who had previously promised him his vote. On the facts, Willes, J., held this not a bribe; so also in *Tamworth* (1869, 20 L. T. 181), 5s. given to the wife of one of the respondent's tenants by a friend, and at the respondent's request, to relieve illness and distress, was held by the same judge to be charity natural *under the circumstances*. In the *Stafford* case, (1869, 1 O'M. & H. 230), although the election was avoided on other grounds, Blackburn, J., commented—unfavourably to the respondent—upon the corrupt intention indicated by a sudden and enormous rise in the amount of the respondent's charities just before the election (see also *Carrickfergus*, 1880, 3 O'M. & H. 90). In *Boston* (1874, 2 O'M. & H. 161), the respondent, who had been in the habit of subscribing largely to local charities, lost the seat owing to the wholesale delivery of coal on the eve of the election by his agent; while in *Plymouth* (1880, 3 O'M. & H. 109), gifts of large sums to the poor, to celebrate some event in the respondent's family, the last being four years before the election, were held to be the outcome of large-hearted benevolence. So also in *Salisbury* (1883, 4 O'M. & H. 28), where the respondent gave £100 in blankets and coals *after* the election, just as he had done in the preceding election, when he was defeated, it was held not a bribe, but charity honestly given. In *Lichfield* (1895, 3 S. L. T. p. 218), a gift of £250 to aid miners on strike, made two years before the election, but recalled to the minds of the electors by a bill at the election, was held not bribery. In *Haggerston* (1896, 3 S. L. T. p. 245), the judges differed in opinion as to the legal effect of distributing visiting cards, exchangeable for food at a coffee house to the value of sixpence. (See also *St. George's Division*, 1896, 3 S. L. T. p. 276.)

Each case, therefore, is a question of circumstances, the guiding principle being the *bonâ fide* nature of the gift. It is safer, however, to run no risks, and, in the words of Bowen, J., in the *Wigan* case (1881, 4 O'M. & H. 14), "charity at election times ought to be kept by politicians in the background."

Treating means directly or indirectly giving or providing corruptly, before, during, or after an election, any meat, drink, entertainment, or provision to anyone for the purpose of influencing votes, and also anyone corruptly accepting of such provision (C. P. P. A., 1883, s. 1; Elect. (Scot.) (Corrupt, etc.) Act, 1890, s. 2).

At common law, general treating, if its effect is to demoralise the constituency and influence the result of the election, will avoid the election (*Tamworth*, 1869, 1 O'M. & H. 85; *St. Ives*, 1875, 3 O'M. & H. 13; *Drogheda*, 1869, 1 O'M. & H. 257).

Under the Statute, the definition clause is qualified by the word

"corruptly," which is interpreted by a series of decisions to mean *the object and intention of doing that thing which the Statute intends to forbid* (*North Norfolk*, 1869, 1 O'M. & H. 242; *Louth*, 1880, 3 O'M. & H. 164; *Second Brecon*, 1871, 2 O'M. & H. 44; *Bewdley*, 1869, 1 O'M. & H. 19; *Cooper* v. *Slade*, 1858, 6 H. L. C. 747; *Carrickfergus*, 1880, 3 O'M. & H. 91; *Launceston*, 1874, 2 O'M. & H. 129).

The essence of the offence is the intention with which it is committed (*Wallingford*, 1869, 1 O'M. & H. 59), and the mind of the voter receiving the treat has nothing to do with it (*Westminster*, 1869, 1 O'M. & H. 95). The Statute is not intended to apply to the exercise of ordinary hospitality among equals, or to prevent a man from "standing" a drink to a friend which he would have done under ordinary circumstances. The giving of drinks at election times is not treating, unless done for the purpose of influencing votes: thus the giving of drinks by brewers to encourage business is not treating (*Rochester*, 1892, Day's El. Cas. 103: *Montgomery*, 1892, *ib.* 151). Corrupt and innocent treating must therefore be distinguished. It is not corrupt to stand a drink to a railway porter who has done a service in the ordinary way (*Norwich*, 1886, 4 O'M. & H. 91), or occasional offers of a drink during an election, provided that they be not too numerous, as these are supposed to be matters of everyday occurrence (*Coventry*, 1869, 20 L. T. 406). A simple desire to acquire general goodwill or popularity does not amount to corrupt treating (*Norwich*, *supra*: *Louth*, 1880, 3 O'M. & H. 167); but if it is intended to influence the election (*Wallingford*, 1869, 1 O'M. & H. 59), or gain a vote (*Carrickfergus*, 1880, 3 O'M. & H. 92), it does—a distinction which in most cases would be extremely difficult to ascertain. It is of course treating to keep open public-houses where drink is supplied free to all (*Bewdley*, 1869, 1 O'M. & H. 16), even though the pretence of enrolling the applicants as committee men is gone through (*Bradford*, 1869, 1 O'M. & H. 33). So also free drinks at a public meeting (*Youghal*, 1869, 21 L. T. 312; but see *Worcester*, 1892, Day's El. Cas. 86).

One glass of beer in *Westbury* (1869, 1 O'M. & H. 50) was held not to justify the inference of a corrupt motive; but a large number of slight single cases will make together one strong case, and intention inferred therefrom (*Bewdley*, 1869, 1 O'M. & H. 19). One glass would be sufficient to avoid the election if it was clearly beyond dispute that it was given "corruptly." If not clear, more is required to found the inference (*Wallingford*, 1869, 1 O'M. & H. 59; *Westbury*, *supra*).

Treating need not be direct. To treat a non-elector in order that he may influence a voter (*Longford*, 1870, 2 O'M. & H. 15), or to give drink to women in order that they may influence the votes of their fathers, brothers, and sweethearts (*Tamworth*, 1869, 1 O'M. & H. 86), will avoid the election. Meat and drink given in moderation to workers at an election, even though they are voters, if *bonâ fide* and honestly done, is not necessarily corrupt treating, although it is an illegal payment (*Barrow*, 1886, 4 O'M. & H. 78; see also *Bradford*, 1869, 1 O'M. & H. 35; *Westminster*, 1869, 1 O'M. & H. 91). But it is more prudent to let them find their own refreshment (*Wallingford*, 1869, 1 O'M. & H. 60). Treating before the election is as much an offence as at or during the election (*Youghal*, 1869, 21 L. T. 316). But its effect must be continuous and operative upon the elector at the time he votes (*Tamworth*, 1869, 1 O'M. & H. 86). So also treating at a prior municipal election may be treating at a parliamentary, if the two are associated (*Hastings*, 1869, 21 L. T. 234); or at a test ballot (*Britt* v. *Robinson*, 1870, L. R. 5 C. P. 503). In *Hexham* (1892, 4 O'M. & H. 143), treating was held to have been committed more than a year before the

election; and in *Berwick* (1803, 1 Peck. 402), two years. Treating *after* an election is more difficult to connect with corrupt motive. The leading case is *Brecon* (1871, 2 O'M. & H. 43). To be corrupt treating, it must be the complement of something done or existing before, and calculated to influence the voter while the vote was in his power. Unless that exists, the by-gone election will be upheld, although it may peril the future election which it is designed to influence (per Lush, J., *Brecon*). An entertainment to celebrate a victory is not of itself corrupt (*Brecon, supra*: *Harwich*, 1880, 3 O'M. & H. 70; *Carrickfergus*, 1869, 1 O'M. & H. 265), but may be an element in dealing with the question of costs (*Carrickfergus, supra*). In the *Poole* case (1874, 2 O'M. & H. 124), the election was upset because the Court could not believe that the subsequent treating was not connected with what had gone before. A promised entertainment, although countermanded, avoided the election in *Kidderminster* (1874, 2 O'M. & H. 173); while in *Salford* (1869, 1 O'M. & H. 141), an entertainment which had not been previously promised, and which was countermanded, but not before some expense had been incurred, did not.

Picnics, fêtes, conversaziones, given by political associations, are dangerous forms of entertainments: and in two cases (*Hexham*, 1892, 4 O'M. & H. 143, and *Rochester*, 1892, 4 O'M. & H. 156), the candidate lost his seat in consequence of his connection with them, and the peculiar circumstances under which the entertainments were given. Political associations may of course give entertainments to their own members, or to outsiders, in return for a subscription payment. But, to avoid any semblance of treating, the food and drink supplied must not be grossly in excess of the value of the admission ticket which gives the right to participate, and any deficit in giving the entertainment ought, as far as possible, to be paid out of the general funds of the association. It is not illegal for a candidate to subscribe generally to the funds of an association, but it is absolutely necessary that he should not contribute to a fund for providing an entertainment at which food and drink is given. On no account must he contribute to any deficit incurred thereby (*Hexham* and *Rochester, supra*). To quote the words of Cave, J., in *Hexham* (Day's El. Cas. 92): "No doubt, so long as the local associations confine themselves to their own members, and do not tout for subscriptions for such a purpose (organising social and other gatherings),—if they unite in order that by means of uniting they may be able to afford a social gathering which, but for such union, they would not be able to afford,—I should see nothing wrong in that. But it is so easy to pass from that to something which is objectionable; and when a local organisation has got up a social fête and there happens to be a loss upon it, there is then the temptation to other people to subscribe and make good that loss, which, if the treat is one involving the giving of meat and drink at a less price than it can be furnished at, comes very perilously near to treating, and cannot be too strongly deprecated." Again, in *Rochester* (Day's El. Cas. 100), the same judge said: "There is, undoubtedly, no harm in political associations so long as they confine themselves to legitimate ends: but they are liable always to be diverted towards illegitimate means, and that is the danger of them; and, undoubtedly, it would be a wise plan, as soon as a candidate has been fixed upon, if those associations would suspend their operations until the election is over, and entirely abstain, as an association, from taking any part, collecting any money, incurring any expense, or paying any accounts during the whole time that the active candidature is going forward." (See also opinion of Pollock, B., in *Worcester*, 1892, 4 O'M. & H. 153, Day's El. Cas. 85: and *Walsall*, 1892, 4 O'M.

& H. 123, Day's El. Cas. 107; *Stepney*, 1892, Day's El. Cas. 118, 123.) Smoking concerts are dangerous, and ought not to be encouraged (*Rochester*, 1892, Day's El. Cas. 101; see also *Lancaster*, 1896, 3 S. L. T. p. 241).

How Agency is Established.—Agency in all cases is a question of fact. It *primâ facie* terminates with the election (*Salford*, 1869, 1 O'M. & H. 136; *East Clare*, 1892, 4 O'M. & H. 163), and it may begin before the dissolution, vacancy, or issue of the writ. It must, of course, have relation to the time when the candidate becomes a "candidate" in the legal sense—a point not very well decided by the recent authorities (see *infra*, *Candidate*). But, according to Hawkins, J., in *Walsall* (1892, 4 O'M. & H. 125), the period during which a candidate can be held responsible for the illegal and injudicious acts of his recognised supporters must be confined within reasonable limits, and, in his opinion, commences from the time when it is first known that the individual presents himself as a candidate for election at the next ensuing election.

As to how agency is established, the best statement of the law is given by Piggott, B., in *Stroud* (1874, 3 O'M. & H. 11): "It is clear that a person is not to be made an agent by his merely acting—that is not enough; he must act in promotion of the election, and he must have authority, or there must be circumstances from which we can infer authority." (See also per Field, J., *Aylesbury*, 1886, 4 O'M. & H. 62). Mere canvassing is not enough (*Bolton*, 1874, 2 O'M. & H. 141). A member of the general election committee, if he does not identify himself further with the election, is not an agent (*Westminster*, 1869, 1 O'M. & H. 91). If he does, he may be (*Westbury*, 20 L. T. (N. S.) 24; *Windsor*, 1874, 2 O'M. & H. 89). Agency was proved in the following cases: *Tewkesbury*, 1880, 3 O'M. & H. 99; *Hereford*, 1869, 1 O'M. & H. 195; *Stroud*, 1874, 3 O'M. & H. 11; *Rochester*, 1892, 4 O'M. & H. 156; *Pontefract*, *ib.* 200; and in *South* and *North Meath*, *ib.* 130, 185, the agency of bishops and priests was clearly established. Agency established by the activity of clubs or political associations is a very important question. It was not established in *Westminster*, 1869, 1 O'M. & H. 91: *Westbury*, 1880, 3 O'M. & H. 79; and *Harwich*, 1880, 3 O'M. & H. 69. It was established in *Taunton*, 1869, 1 O'M. & H. 181; *Blackburn*, 1869, 1 O'M. & H. 200; *Wakefield*, 1874, 2 O'M. & H. 102; *Londonderry*, 1869, 21 L. T. 709; *Gravesend*, 1880, 44 L. T. 64; *Bewdley*, 1880, 3 O'M. & H. 145; *Hexham*, 1892, 4 O'M. & H. 145; and *Rochester*, 1892, 4 O'M. & H. 158. It is not easy to draw the dividing line in questions raising the agency of associations. The *Bewdley* case is perhaps the most instructive, and in this connection the remarks of Lopes, J., may well be quoted. After dealing with the non-liability of a candidate for the acts of an absolutely independent association, acting entirely on its own behalf, he says: "There may, on the other hand, be a political association in the borough advocating the views of a candidate, of which that candidate is not a member, to the funds of which he does not subscribe, and with which he personally is not ostensibly connected, but at the same time in intimate relationship with his agents, utilised by them for the purpose of carrying on his election, interchanging communication and information with his agents respecting the canvassing of voters and the conduct of the election, and largely contributing to the result. To say that the candidate is not responsible for any corrupt acts done by an active member of such an association would be repealing the Corrupt Practices Act, and sanctioning a most effective system of corruption."

Employment by the candidate personally of a corrupt agent, *e.g.* one who within the preceding seven years has been reported for any corrupt

practice, voids the election (31 & 32 Vict. c. 125, s. 44; *North Norfolk*, 1869, 1 O'M. & H. 238, 21 L. T. 265; see also *Norwich*, 1871, 2 O'M. & H. 38; *Galway*, 1872, 1874, *ib.* 51, 196).

Undue Influence means directly or indirectly using, or threatening to use, force or injury against any person for the purpose of influencing votes, or in any way impeding the free exercise of the franchise by any elector (s. 2, C. P. P. A., 1883; s. 2 and Sched. I. Elect. (Scot.) (Corrupt, etc.) Act, 1890).

This is an offence really created by the Statute 17 & 18 Vict. c. 102 (now repealed and incorporated in 46 & 47 Vict. c. 51), although as early as 3 Edw. I. c. 5,—a Statute declaratory of the common law,—interference with the right of free election, by malice or menacing, was forbidden under pain of great forfeiture. By resolution of the House of Commons in 1802 (57 Journal, 34, 376), peers, prelates, and lords lieutenant are prohibited from influencing the election of any member to serve for the Commons in Parliament. But a peer who is also a landlord is entitled to "legitimate influence" (*Galway*, 1872, 2 O'M. & H. 54). So also interference of ministers and servants of the Crown (37 Journal, 507), by the military (4 Journal, 346; 24 Journal, 37; 10 & 11 Vict. c. 21), and by the police, for the purpose of influencing voters, is an offence.

Statutory undue influence is that with which we have most concern, and, apart from the definition given in sec. 2 of 46 & 47 Vict. c. 51, it has been defined by Willes, J., in *Lichfield* (1869, 1 O'M. & H. 25), to be the "using any violence or threatening any damage, or resorting to any fraudulent contrivance to restrain the liberty of a voter, so as either to compel or frighten him into voting or abstaining from voting otherwise than he freely wills."

Undue influence in the legal sense may be divided into three classes:

(1) *Force, Violence, or Restraint*: as beating or threatening to beat a voter (*North Norfolk*, 1869, 1 O'M. & H. 240), holding an unloaded pistol at a voter's head (*Oldham*, 1869, 1 O'M. & H. 162), engaging disorderly bands of men to terrify others (*Stafford*, 1869, 1 O'M. & H. 229; *Longford*, 1870, 2 O'M. & H. 12). To retain pugilists and others to act as a defensive force is not illegal, though the practice is to be condemned (*Salford*, 1869, 1 O'M. & H. 140; *Limerick*, 1870, 21 L. T. 567; *Tamworth*, 1869, 1 O'M. & H. 78).

A threat is as much an offence as the actual act (*Oldham* and *Longford*, *supra*; *Northallerton*, 1869, 1 O'M. & H. 168; *Windsor*, 1874, 2 O'M. & H. 91).

(2) *Temporal or Spiritual Injury.*—A landlord may canvass his tenants and exhaust every argument to persuade them to vote as he wishes, provided he neither inflicts nor threatens to inflict any injury upon any tenant who holds out (*North Norfolk*, 1869, 1 O'M. & H. 237; see also *Windsor*, 1869, 1 O'M. & H. 6; *Galway*, 1872, 2 O'M. & H. 54). For dismissal of employees by an employer upon the ground of political opinion, see *Westbury* (1869, 1 O'M. & H. 50). To be safe, the clearest evidence of dismissal for other reasons must be given (*Blackburn*, 1869, 1 O'M. & H. 203; *North Norfolk*, 1869, 1 O'M. & H. 241). To withdraw custom from a tradesman avowedly because of his voting or not voting is using undue influence (*North Norfolk, supra*; *North Durham*, 1874, 2 O'M. & H. 159). The most recent cases of spiritual intimidation are *South* and *North Meath* (1892, 4 O'M. & H. 130, 185). There, undue influence by the bishop and clergy was so prevalent as to avoid the elections at common law. (See also *Longford*, 2 O'M. & H. 16; *Galway*, 1869, 1 O'M. & H. 305; *Galway*, 1872, 2 O'M. & H. 57.) For

instances of spiritual intimidation before the Statute, see *Sligo*, 1853, 2 P. R. & D. 256: *Mayo*, *ib.* 201; *Clare*, *ib.* 243; and *Cork*, 1842, B. & Aust. 534.

(3) *Abduction, Duress, or other Fraudulent Contrivance.*—Abduction is rare, and is reported only in three old cases (*Lisburn*, 1863, W. & B. 227, and *Cockermouth*, 1853, 2 P. R. & D. 166; *Douglas*, 1866, 5 Irv. 265), and in one modern case (*Lichfield*, 1880, 3 O'M. & H. 136). To make a voter so drunk as to be unable to vote is undue influence (*Staleybridge*, 1869, 20 L. T. 75). Where two voters agree to pair, and one fraudulently votes, this would probably be held to be a fraudulent device (*Northallerton*, 1869, 1 O'M. & H. 169).

Voting-cards marked as ballot papers, and a statement that a mark elsewhere would invalidate the vote, are not necessarily "fraudulent contrivances," unless it can be shown that, in addition to the intention to deceive, some voter or voters were actually impeded or prevented from voting by such contrivance (*Gloucester*, 1873, 2 O'M. & H. 60; *Stepney*, 1886, 4 O'M. & H. 57). A circular distributed broadcast among the electors, announcing that the secrecy of the Ballot Act was a farce, and that the agent would be able to tell how each voter had voted, raised a difference of opinion between the two judges in the *Dover* case (1880, 3 O'M. & H. 122), one holding that it was a fraudulent contrivance, the other not. See also *Stepney* (*supra*).

General intimidation, at common law, though not brought home to a candidate or his agents, will avoid an election. Thus, where violence is so great as to prevent the election being free (*Staleybridge*, 1869, 1 O'M. & H. 72: *Galway*, 1874, 2 O'M. & H. 200), or rioting of such a kind as to deter voters from exercising the franchise (*Clare*, 1853, 2 P. R. & D. 246; *Thornbury*, 1886, 4 O'M. & H. 66; *Stafford*, 1869, 1 O'M. & H. 229; see also *Lichfield*, 1880, 3 O'M. & H. 136; *Dudley*, 1874, 2 O'M. & H. 120; *North Durham*, 1874, 2 O'M. & H. 156; *Drogheda*, 1869, 1 O'M. & H. 254).

Personation means applying for a ballot paper in the name of some other person, fictitious or not, or applying for a second ballot paper when the voter has voted once already, and the aiding and abetting of such an offence (s. 24, Ballot Act, Sched. III. Part III. C. P. P. A., 1883; s. 2 and Sched. I. Elect. (Scot.) (Corrupt, etc.) Act, 1890). If the candidate or any agent of the candidate knowingly instigates any person to commit the offence of personation, or aids and abets such person in so doing, the election is void (ss. 4, 5, Act of 1883). As to what must be proved in order to establish a case of personation by an agent, see *Gloucester* (1873, 2 O'M. & H. 63). Willes, J., in *Coventry* (1869, 1 O'M & H. 105), before the Act was passed, thought such conduct on the part of a candidate or agent would void the election at common law (see also *Gloucester*, *supra*). Personation by independent voters does not affect the election, except in so far that the vote of a guilty person is struck off. Doubt has been expressed as to the avoidance of an election at common law on grounds of general personation, *i.e.* personation unconnected with the candidate or his agents (*Belfast*, 1886, 4 O'M. & H. 108). There the Court thought that personation could not be successfully alleged, irrespective of agency, against the respondent.

A double entry on the register gives no right to vote twice. To vote twice at the same election may or may not be an offence, according as it is corruptly or innocently done. Mere application for the second ballot paper makes the offence complete.

Personation is an offence which involves corruptness, involves a knowledge that something wrong is being done. If a second vote is given innocently by a person, under the honest belief that he is voting with a

right, he cannot be held to be guilty of personation within the meaning of the Act (per Denman, J., *Stepney*, 1886, 4 O'M. & H. 44). In such circumstances the first vote is good, the second is bad and must be struck off (*Stepney, supra*; *Finsbury*, 1892, 4 O'M. & H. 174); and where some person votes in the name of another who did not vote, the vote so given must be struck off (*Finsbury, supra*, 175). Where father and son had the same name, and the son voted in the name of his father, deceased, in respect of the same property to which he had succeeded, and for which he ought to have been, and thought he was, on the roll, the Court held no offence had been committed (*Athlone*, 1876, 3 O'M. & H. 59). Where both father and son had the same name, residence, and qualification, and there was only one entry on the roll, the son's vote, who voted first, was struck off, and the father's retained (*Oldham*, 1869, 1 O'M. & H. 153). Where two persons had the same name, but one only was qualified to be on the register, and the agent unknowingly persuaded the wrong man to apply for a ballot paper, no offence was attributed to the agent (*Gloucester*, 1873, 2 O'M. & H. 63). Although the words of the section make it an offence to apply "for a ballot paper in the name of *some other person*," yet if two men have the same name, and one only is on the roll, it is personation if the person not on the roll applies for a ballot paper, although in point of fact he does so *in his own name*, and not in that of *some other person* (*Rothwell*, 1869, 20 L. T. 314; *Clark*, 1881, 44 L. T. 290). It is not personation if a man applies for a ballot paper in a name other than his real name, if the name inserted in the register was intended to be applicable to him, and was inserted in the belief that it was his real name (*R.* v. *Fox*, 1887, 16 Cox, Cr. Ca. 166).

The penalty for personation may not exceed two years' imprisonment with hard labour. No fine can be levied, nor is there any discretion in the judge as to imprisonment without hard labour.

False Declaration as to Election Expenses.—If a candidate or agent knowingly makes the declaration as to election expenses required by sec. 33 of the C. P. P. A., 1883, falsely, he is guilty of an offence, and on conviction is liable to punishment for wilful and corrupt perjury: and such offence is deemed to be a corrupt practice, and entails liability to all the penal consequences (s. 33 (7) C. P. P. A., 1883).

Penalties for Corrupt Practices.—(*a*) *Parliamentary.*—If bribery or personation has been proved to have been committed at an election by or with the knowledge and consent of any *candidate*, and treating or undue influence by any *candidate*: (1) the election is void; (2) the candidate is disabled for ever from being elected or sitting as member for the same constituency; (3) the candidate is liable to the same punishments and incapacities as any other person convicted of corrupt practices, mentioned below (s. 4, C. P. P. A., 1883).

If committed by the *candidate's agent*: (1) the election is void; (2) the candidate is disabled for seven years from being elected or sitting as member for the same constituency; (3) the agent is liable to the same punishments as in (3) above (s. 5, C. P. P. A., 1883).

If a corrupt practice, other than personation, is committed by *any other person*, such person is: (1) liable to imprisonment for one year, or a fine not exceeding £200; (2) incapacitated for seven years from being registered as an elector or voting in any election; (3) incapacitated for seven years from holding any public office: if he holds such office, it is *ipso facto* vacated; (4)

incapacitated for seven years from being elected or sitting as a member of the House of Commons (s. 6 (1) (3) a. b. (4) C. P. P. A., 1883).

In addition, the vote of a guilty person, given at the election at which the offence was committed, is void (s. 36, C. P. P. A., 1883).

The penalty for personation is specially provided for. Committing, aiding, or abetting the commission of personation at an election renders a person liable to imprisonment for a term not exceeding two years, with hard labour (s. 6 (2) C. P. P. A., 1883).

A false declaration regarding expenses under sec. 33, made knowingly by the candidate or his agent, is declared to be a corrupt practice within the meaning of the Act (s. 33 (7)), and therefore involves the consequences and penalties of these provisions noted above.

(*b*) *Municipal and other Elections.*—Any person convicted of corrupt practices in these elections is subject to the same punishments and incapacities as if the offence had been committed in reference to a parliamentary election (s. 3 Elect. (Scot.) (Corrupt, etc.) Act, 1890).

If committed by *the candidate*: (1) the election is void; (2) he is incapacitated for ever from holding a corporate office, *e.g.* town councillor, etc.; (3) he is subject to the penalties imposed on a person guilty of corrupt practices in a parliamentary election (see above).

If committed by *the agent*: (1) the election is void; (2) the candidate is incapacitated for three years from holding corporate office; (3) the agent is subject to the same general penalties as above (s. 4 (1) (2) Elect. (Scot.) (Corrupt, etc.) Act, 1890). Where a person has been guilty of several acts of bribery at a municipal election, he is liable to a penalty in respect of each such act of bribery (*Milnes* v. *Lale*, *Milnes* v. *Lea*, 10 C. P. 501).

Illegal Practices.

The following offences are declared to be illegal practices within the meaning of the C. P. P. A., 1883:—

(1) Paying for conveyance of voters to the poll (s. 7). (2) Paying electors for placarding in windows, etc. (s. 7). (3) Paying for committee rooms in excess of number authorised, or receiving such payment, knowing such to be in contravention of the Act (s. 7). (4) Paying election expenses except through election agent (s. 28). (5) Incurring expenses in excess of the maximum (s. 8). (6) Inducing a prohibited person to vote, or being prohibited and voting (s. 9). (7) Publishing a false statement of withdrawal of a candidate (s. 9). (8) Paying any election expense after time limited for payment (s. 29). (9) Failing to make the return of election expenses within time limited (s. 33).

It is necessary to keep in view the distinction made by the Act between illegal practices and illegal payments, employment, and hiring. What are classed as illegal practices under secs. 7, 8, 9, avoid the election if committed by the candidate or *any* of his agents (s. 11), while those classed as illegal payments, employment, and hiring become illegal practices, and thus avoid the election, if committed by the candidate or his *election agent*, leaving out of account their commission by agents other than the election agent.

Corrupt practices are thus distinguished from illegal practices by Field, J., in *Barrow* (1886, 4 O'M. & H. 77): "A corrupt practice is a thing the mind goes with. An illegal practice is a thing the Legislature is determined to prevent, whether it is done honestly or dishonestly. Therefore the question here is not one of intention, but whether, in point of fact, the Act has been contravened." See also *Walsall* (1892, 4 O'M.

& H. 127). Relief may be obtained for acts and omissions amounting to illegal practices, but no relief is obtainable if such acts amount to corrupt practices.

Under secs. 7 and 28 of the 1883 Act, there are four offences under the head of illegal practices, which, if committed by the candidate or *any* agent, avoid the election. These are: paying for conveyance of voters to the poll, paying electors for placarding, paying for committee rooms in excess of the number, and paying election expenses except through election agent.

Conveyance.—Provision is made for the conveyance of voters by sea to the poll by sec. 48, 46 & 47 Vict. c. 51, and the expense incurred may be in addition to the maximum. The words of sec. 7, making payment for conveyance of voters to the poll an illegal practice, and the words in sec. 14, making the letting, hiring, etc., of hackney carriages for that purpose a less offence, namely, an illegal payment, give rise to much discussion as to whether the offence complained of is properly under sec. 7 or under sec. 14. And it makes all the difference to the candidate; for if under sec. 7, and committed by him or *any* agent, it avoids the election: whereas, if under sec. 14, it does not, unless it is committed by him personally or by his *election* agent. (See Mattinson and Macaskie on *Corrupt Practices*, 3rd ed., p. 68; *Manchester*, 1892, 4 O'M. & H. 120.) In *Lichfield* (1895, 3 S. L T. p. 218), the systematic baiting of horses was decided to be an offence under sec. 7. So in *Southampton* (1895, 3 S. L. T. p. 225), payment of two shillings for a voter's railway fare by a person not the candidate or his election agent, is an offence. There the sitting member was unseated, as relief was not granted in consequence of his having identified himself with disorderly scenes and processions, thus precluding the idea that he had, in terms of sec. 22, used all reasonable means for preventing illegal practices at the election. For one voter to pay another voter's tramcar fare to the poll is an everyday occurrence, and therefore not illegal (*Lancaster*, 1896, 3 S. L. T. p. 241). In *Buckrose* (1886, 4 O'M. & H. 117), where a voter used a cab to drive to the poll and did not pay for it, it was held no offence had been committed.

Exhibiting Placards.—It is illegal to pay voters to exhibit bills, etc., in or upon premises belonging to them (*Westminster*, 1869, 1 O'M. & H. 89). It is apparently not illegal to pay non-voters to do so, if the payments are not excessive. If they were, then it would be bribery. As to what are bills, placards, etc., see *Stepney*, 1886, 4 O'M. & H. 52; *Barrow-in-Furness*, 1886, 4 O'M. & H. 76. See also *Pontefract*, 1893, Day's El. Cas. 126.

Committee Rooms.—Committee room is not defined by the Act. What the Act strikes at is payment for additional committee rooms. It would therefore appear as if the candidate might use any number of rooms, *lent* by friends, provided they did not fall under that description of premises specially prohibited.

Expenses Paid through Person other than Agent.—Election expenses must be paid through the election agent, who is bound to return everything spent on behalf of the candidate. It is an illegal practice not to do so (s. 28, Act 1883). But the section does not apply to any payments by the returning officer, or to any sum disbursed by any person out of his own money for any *small expense* legally incurred by himself, if such sum is not repaid to him (*ib.*). "*Small expense*" has not yet been defined, but in *Norwich* (1886, 4 O'M. & H. 89), the Court suggested that, possibly, the payment of half a crown might pass. The agent must pay the election expenses, although incurred before his appointment (*Ipswich*, 1886, 4 O'M.

& H. 73; *Rochester*, Day's El. Cas. 99). As to what books the agent ought to keep, see Mr. Justice Cave's opinion in *Stepney*, Day's El. Cas. p. 37. Expenses of registration are not election expenses (*Kennington*, 1886, 4 O'M. & H. 93; *Hexham*, 1892, Day's El. Cas. 91); nor expenses of preliminary meetings to select a candidate (*Norwich*, 1886, 4 O'M. & H. 84); nor political or other lectures (*Haggerston*, 1896, 3 S. L. T. p. 245). In *Hood* v. *Gordon* (Elgin, 1895, 23 R. 178), the expenses of a salaried official of the Unionist Associations, amounting to £223, and the expense of meetings addressed by the candidate sixteen months before the election, amounting to nearly £60, all of which were paid by the association through the said official, were held not to be election expenses in the sense of secs. 8 and 28, notwithstanding the fact that the candidate had subscribed £120 that year, and £120 the year succeeding, to the funds of the Local Conservative Association (per Ld. M'Laren, at pp. 184 and 187).

As regards the remaining offences, whether they be described in the Act as illegal practices or as illegal payments, etc., they avoid the election only if committed by the candidate or his *election* agent.

Expenses in Excess of Maximum.—The first of these offences is, incurring expense in excess of the maximum allowed (s. 8, Act 1883). In *Hood* v. *Gordon* (Elgin, 1895, 23 R. 178), the expense of meetings addressed by a candidate sixteen months before election was held, not to come under election expenses. The expense of giving lectures, political or otherwise, is not an expense on account of the election (*Haggerston*, 1896, 3 S. L. T. p. 245).

Inducing Prohibited Persons to Vote.—The next offence is, inducing a person to vote who is *prohibited by Statute* (s. 9). Under the 1883 Act, such prohibited persons are those disqualified under sec. 37 of the Act, namely, those who have become incapable of voting at any election in consequence of conviction, or of the report of an Election Court in proceedings under any Act relating to corrupt practices; persons guilty of corrupt or illegal practices or payments, etc., at such election (s. 36); and all *paid* agents (1st Schedule, Part I.). (See *Stepney*, 1892, 4 O'M. & H. 178; Day's El. Cas. 117.) By Statute, other than the 1883 Act, the following persons are prohibited from voting: Minors; convicts; sheriffs, including sheriff-substitutes, sheriff clerks, and town clerks; peers; burgh and county assessors; householders failing to pay poor rates; persons receiving parochial relief; and the returning officer, unless there is an equality of votes. Whether inducing a person prohibited only at common law, *e.g.* women, to vote, would be an illegal practice under sec. 9, it is difficult to say. But it may be pointed out that the words infer prohibition by *Statute* only.

Corrupt Withdrawal of Candidate.—The next offence is publishing a false statement of the withdrawal of a candidate.

Name and Address of Printer on Bills.—The name and address of the printer must be on all bills, placards, and posters which are printed and published. It is an illegal practice to omit it. As to the meaning of "bill," see *Barrow*, 1886, 4 O'M. & H. 78. Circulars are not bills (*Barstow*, 1888, 5 T. L. R. 159), and election addresses are thought not to fall within the section (*ex p. Ives*, 1885, 5 T. L. R. 136). What is sufficient evidence of printing, or causing to be printed, see *Bettesworth* v. *Allingham* (1885, 16 Q. B. D. 44).

Payment of Election Bills after Proper Time.—Another illegal practice is payment of election bills except within specified time, *i.e.* twenty-eight days after the declaration of election (s. 29, subs. 2, 4). There is a saving clause in subsec. 6 to the effect that the election shall not be void

if the offence was committed without the sanction or connivance of the candidate. A candidate or his election agent who fails to comply with the requirements of sec. 33, relating to the declaration and return of expenses, is guilty of an illegal practice, unless he has an authorised excuse: the return must be made within thirty-five days of the declaration of the election.

Penalties for Illegal Practices.—(*a*) *Parliamentary.*—If committed *by the candidate*: (1) the election is void; (2) he is incapacitated from being elected, or sitting as member for the same constituency for seven years; (3) he is subject to the general penalties imposed by ss. 10, 36, 64, of the C. P. P. A. 1883, mentioned below.

If *by the agent*: (1) the election is void; (2) the candidate is incapacitated from being elected for the same constituency during that parliament; (3) he is subject to the general penalties as below.

If *by any person*: (1) fine not exceeding £100 (s. 10); (2) vote at the election is void (s. 36); (3) incapacity to vote for five years at any election, parliamentary, county council, etc., held within the burgh or county where the offence was committed (ss. 10–64).

(*b*) *Municipal and other Elections.*—If *by any person*: (1) fine not exceeding £100; (2) incapacity for five years from being registered or from voting at any election held in same county, burgh, or parish where offence was committed.

If *by the candidate or agent*: (1) same as (1) and (2) above; (2) the election is void; (3) candidate incapacitated from holding any corporate office during the period for which he might have served (ss. 11, 12, Elect. (Scot.) (Corrupt, etc.) Act, 1890.

Illegal Payments, Employment, and Hiring.

Payments.—(1) Providing money for payment prohibited, or in excess of maximum allowed (s. 13); (2) corruptly inducing any candidate to withdraw (s. 15); (3) payments on account of bands, torches, flags, banners, etc. (s. 16).

Employment.—(1) Employing and paying persons in excess of number allowed (s. 17); (2) printing and publishing bill or placard without printer's name (s. 18).

Hiring.—(1) Letting, lending, or employing a hackney carriage to convey voters (s. 14); (2) hiring for committee rooms prohibited premises —licensed premises, refreshment rooms, or public elementary school (s. 20).

Illegal Payments.—The offences of illegal payments, illegal employment, and illegal hiring are not illegal practices, unless committed by the candidate, his election agent or sub-agent (ss. 21 (2), 25 (2)).

Payment of Money contrary to Act.—The first of the offences known as illegal payments is providing money for any payment which is contrary to the provisions of the 1883 Act, or in excess of the maximum (s. 13).

Payment to withdraw from Candidature.—The next is to corruptly induce any candidate to withdraw from the candidature in consideration of any payment or promise to pay (s. 15).

Payment for Banners, Bands, etc.—The most important offence, and that which occurs most frequently, is the offence detailed in sec. 16; prohibition of payment for bands, torches, flags, banners, cockades, ribbons, or other marks of distinction. Payment for hat-cards in *Walsall* (1892, 4 O'M. & H. 127; Day's El. Cas. 70, 109), which were held to be marks of

distinction, avoided the election. (But see *Pontefract*, 1892, 4 O'M. & H. 200, Day's El. Cas. 71, 127, and *East Clare*, 1892, 4 O'M. & H. 163, Day's El. Cas. 164, where certain cards were held not to be marks of distinction.) Banners (see *Stepney*, 1892, 4 O'M. & H. 179; *St. George's Division*, 1896, 3 S. L. T. p. 277); rosettes (*Pontefract, supra*, where the charge failed, as there was no evidence of payment). In *Stepney* (1892, 4 O'M. & H. 39), the fixing of a banner across a street, for which no payment was made, injured the roof of a house. Payment to a voter for repairing the damage did not fall under sec. 16.

Illegal Employment—of persons in Excess of Number Allowed by Act.—No person is to be engaged or employed for payment for any purpose or in any capacity whatever except those mentioned in the first or second parts of the First Schedule of the Act 1883, or except so far as payment is thereby authorised (s. 17 (1)). As to what persons are authorised by the Act, see *infra*, under heading Election Expenses. Extra clerical work may or may not be an illegal employment, according to the intention with which the employment is made (*Pontefract*, Day's El. Cas. 72, 129; see also *Walsall*, Day's El. Cas. 73). A regular clerk of the election agent, who does not receive additional remuneration, may be legally employed to address envelopes and do other work in and about an election (*Buckrose*, 1886, 4 O'M. & H. 116). Volunteers may be used to keep order at meetings, but not hired persons (*Ipswich*, 1886, 4 O'M. & H. 72). In the case of volunteers, nothing must be given to them. In *Barrow* (1886, 4 O'M. & H. 78), the sitting member was unseated in consequence of volunteers receiving very moderate refreshment. Canvassers may be employed gratuitously, but not for payment (*Stepney*, 1892, Day's El. Cas. 119; *Lichfield*, 1895, 3 S. L. T. p. 219; *Hood* v. *Gordon* (Elgin), 1895, 23 R. 178, at p. 188). In the *Elgin* case, it was held that a fee paid to a polling agent was not to be regarded as to any extent a payment to him as a sub-agent, merely because he, as polling agent, voluntarily canvassed certain electors. The employment of an agent formally to perform duties additional to those for which he was expressly engaged, may be prohibited by sec. 17. But, to invalidate an election on this account, a clear case of evasion would require to be made out. An employee is in no way inhibited from using his personal exertion as an elector to influence the votes of others, though he himself may not vote (Ld. M'Laren, p. 189). As to colourable employment of persons as registration agents, but really canvassers, see *Rochester*, 1892, Day's El. Cas. 102.

Illegal Hiring.—There are two offences which fall under this head, namely, the hiring of hackney carriages and horses (s. 14), and the use of licensed premises, etc., for committee rooms (s. 20).

Hiring of Hackney Carriages, etc.—Sec. 14 forbids the letting or hiring, the lending or borrowing, the using or employing, any horse or carriage *which is kept for the purpose of being let out to hire*. But by subs. 3 of sec. 14, electors may hire a cab to the poll, if paid for by themselves at "their joint cost." If this sub-section had been omitted, to hire a cab would have been an offence. Illegal hiring was alleged in *Manchester* (1892, 4 O'M. & H. 120), and some difficulty was experienced under which section (7 or 14) the charge fell. It was ultimately laid under sec. 14; but as the offence was not alleged to have been committed by the candidate or his election agent, it was held no illegal practice had been established. With the exception of hackney carriages and horses *kept for*

the purpose of being let out to hire, it is perfectly legal for the candidate or his agent to accept from private individuals, not being horse-hirers, job-masters, or livery-stable keepers, or persons of that description, the loan or use of any horse and carriage *gratuitously* for conveyance of electors on the polling day. Payment for the systematic baiting of horses is an offence under sec. 7 (*Lichfield*, 1895, 3 S. L. T. p. 218).

Committee Rooms in Prohibited Premises.—The offence of illegal hiring is committed if any person hires or uses as a committee room, a room on any premises (1) licensed for the sale of drink; (2) where drink is sold to members of a club, society, or association, other than a permanent political club; (3) where refreshment of any kind is sold; and (4) which form a public elementary school in receipt of an annual parliamentary grant, or any part thereof (s. 20). There is a proviso that the section shall not apply if such premises are usually let for such purposes as meetings, etc., and if they have a separate entrance, and no communication with the premises on which drink and refreshment are supplied. Where the schoolmaster's house, though separate from the school, but within the same curtilage, was used as a committee room, it was held that such use was illegal (*Buckrose*, 1886, 4 O'M. & H. 113).

Penalties for Illegal Payments, etc.—If committed by *the candidate* or *his agent*, the offence becomes an illegal practice, and is punishable accordingly (s. 21 (2)).

If by *any person*: (1) fine not exceeding £100 (s. 21 (1)); (2) vote given is void (s. 36). These provisions apply to municipal, county council, and other elections (s. 21, Elect. (Scot.) (Corrupt, etc.) Act, 1890).

Application of the C. P. P. A., 1883, to Municipal and other Elections.—The provisions of the C. P. P. A. 1883, with reference to corrupt and illegal practices, etc., apply to municipal, county council, and other elections by the Elect. (Scot.) (Corrupt, etc.) Act, 1890, Schedules I. and III. ss. 8–10, 13–20—with the following exceptions: It is not an illegal practice in these elections to make any payment otherwise than through the election agent, or to hire as a committee room any public elementary school (s. 20, Act 1890). Claims must be sent in within 14 days, and election expenses must be paid within 21 days, and not 28, as is the case in parliamentary elections. The agent must make the return to the candidate of all expenses within 23 days, and the agent, or the candidate if there is no agent, must make the return to the "prescribed officer," *i.e.* county clerk, town clerk, etc., of all his expenses within 28 days (s. 25 (1) (2) (3) *ib.*).

Relief and Exoneration.—Until the Act of 1883, if any act of treating, however trifling, were proved to have been committed by an agent, the election judges had no option but to declare the election void. Now, a limited power of granting relief to a sitting member is given to the Court trying a parliamentary or municipal petition, as regards the former by sec. 22 of the C. P. P. A., 1883, and as regards the latter by sec. 23 of the Elect. (Scot.) (Corrupt, etc.) Act, 1890. These two sections deal with treating, undue influence, and illegal practices, while in each Act the succeeding sections, 23 and 24 respectively, introduce a further measure of relief, by granting power to the Court to except an innocent act from being an illegal practice, payment, employment, or hiring.

The substance of the 22nd section of the Act of 1883 is as follows: If an Election Court finds that a candidate has been guilty by his agents of the offence of treating, or of undue influence, or of an illegal practice,

but (1) that the offence was committed contrary to the orders, and without the sanction or connivance of the candidate or his election agent, and (2) that all reasonable means were taken to prevent corrupt and illegal practices, and (3) that the offence was trivial and unimportant, and (4) that in all other respects the election was free from corrupt or illegal practices on the part of the candidate and his agents—then his election shall not be void, nor shall he be subject to any incapacity under the Act (sec. 22, C. P. P. A. 1883). It will be observed that this section is very closely drawn, and so hedged in with restrictions as to be somewhat narrow in its application.

Under no circumstances can relief be granted for *bribery* or *personation*, or indeed for knowingly making a false declaration of expenses, or knowingly employing a corrupt agent (s. 44, Act of 1868, 31 & 32 Vict. c. 125), or for general and extensive corruption at common law, or if the offence was committed by the candidate or his election agent personally. It is not always easy to distinguish between bribery and treating. It is bribery to promise a drink for a vote (*Bodmin*, 1869, 1 O'M & H. 124). It is treating to give it. The latter of these offences, if committed by an agent other than the election agent, may be excused; the former apparently may not.

The phraseology of sec. 23 of the Elect. (Scot.) (Corrupt, etc.) Act, 1890, applicable to municipal elections, is almost identical with that in sec. 22 of the 1883 Act, with these exceptions, that it omits all reference to the election agent, and that the candidate does not require to prove that the offence was committed contrary to his orders. An election agent is not required in connection with a municipal election, though perhaps the appointment of one may be said to be contemplated by sec. 25 (2) of the 1890 Act.

Under sec. 22, relief may be given for illegal practices as well, but that section applies only to offences committed by persons other than the candidate or his election agent. The next section of the Act of 1883, sec. 23, carries the possibilities of relief still further, and even extends it to cases where the illegal practice has been committed by the candidate himself, or his election agent.

The substance of sec. 23 is as follows:—

Where any act or omission of a candidate or his election agent, or of any other agent or person, would, by reason of being a payment, employment, or contract in contravention of this Act, be an illegal practice, it may be excused as an innocent act by the Election Court, provided that it arose from inadvertence or accidental miscalculation, or from some other reasonable cause of a like nature, and not from any want of good faith.

The words "contract in contravention of this Act" would clearly cover the illegal practices mentioned in sec. 7: paying the conveyance of voters to the poll, paying window exhibits, and committee rooms in excess of number; and the general words of the section would embrace the remainder of illegal practices, including those relating to expenses; so that there appears to be no illegal practice for which, if committed by the candidate or his election agent, relief may not be obtained under this section. As regards other agents and persons, relief may be obtained under sec. 22 or sec. 23.

In sec. 24 of the 1890 Act, applicable to municipal elections, etc., the terms are almost similar. Its effect is identical with sec. 23 of the 1883 Act.

Procedure to Obtain Relief.—Relief, or, more strictly speaking, a report of exoneration under sec. 22, can be obtained only from the Election Court at the trial of the petition; but relief from the consequences of illegal

practices under sec. 23 may be obtained on application either to the Election Court, if sitting, or to one or other of the Divisions of the Court of Session (ss. 56 (1), 68 (4)), provided that notice of the application has been given in the constituency in which the election was held in such a manner as to the Court seems fit (s. 23 (c)).

Some doubt exists as to the competency of making applications to the Divisions in matters connected with election petitions and corrupt practices, and this arises from the confusion introduced by the definition of the words "Court," "High Court," by: (1) sec. 58 of the Parl. Elect. Act, 1868, and 17 and 24 of the Rules of 1868; and (2) sec. 68 (4) of the C. P. P. A., 1883, and also from the fact that no Rules or Acts of Sederunt have been passed regulating procedure under the C. P. P. Act of 1883. The difficulty is to a certain extent removed by the decision in *Hood* v. *Gordon* (1895, 23 R. 4), where the First Division held that an application to amend a petition under sec. 40 (2) of the 1883 Act could be competently made only before the Division, and not before the Election Court. (See also on Competency, *Christie* v. *Griere*, 1869, 7 M. 378, and *Irwin* v. *Muir*, 1874, 1 R. 834.)

As regards the proper Court to apply to *in questions of relief* under secs. 23 or 34 of the 1883 Act, the application may competently be made either to the Inner House, which may or may not remit to any judge (s. 68 (4) (and presumably to the election judges if a remit is necessary—see *Hood* v. *Gordon, supra*); or to the Election Court, if sitting: or to the Lord Ordinary on the Bills, if the matter arises in vacation. How far the Lord Ordinary on the Bills in vacation may proceed in the matter has never been determined in Scotland, because, so far as can be ascertained, no application for relief has ever been made in vacation in Scotland since 1883; but it is submitted that he has full powers to determine finally, first, on account of the summary nature of the application; secondly, from the fact that the special functions of the Inner House are occasionally, in urgent cases, exercised by him; and, thirdly, by Rule 24 of the Parl. Elect. Pet. Rules of 1868, all interlocutory questions and matters relating to a petition, except as to the sufficiency of the security, may competently be disposed of by him.

If the application for relief is made to an Election Court, no notice of the application is required (*Norwich*, 1886, 4 O'M. & H. 89).

Application for relief may be made whether there is a petition or not. It ought to be made as soon as the discovery of the illegal practice is made, for immediate application to the Court may stave off a petition. Where a petition was pending, the Court ordered the application for relief to stand over until after the trial of the petition (*ex p. Wilks*, 1885, 16 Q. B. D. 114; *ex p. Evans*, 1889, 5 T. L. R. 207; cf. *ex p. Kempson*, 1889, 5 T. L. R. 220; *ex p. Clark*, 1885, 52 L. T. 260; *ex p. Stephens*, 1889, 5 T. L. R. 203).

Circumstances in which Relief has been Granted or Refused. — In *Rochester*, 1892, 4 O'M. & H. 156, and *Stepney*, 1892, 4 O'M. & H. 178, the opinions of Mr. Justice Cave and Mr. Justice Vaughan Williams contain most important utterances upon the question of relief, those who are entitled to it, and what is the meaning of "inadvertence" in sec. 23. "Inadvertence" was also discussed in *Walsall*, 1892, 4 O'M. & H. 123 (Baron Pollock and Sir Henry Hawkins), and their decision in this regard seems to be in conflict with *Stepney*. See also *ex parte Walker*, 1889, 22 Q. B. D. 384. In *ex parte Lenanton* (1889, 5 T. L. R. 173), "inadvertence" is defined to mean negligence or carelessness, where the circumstances show an absence of bad faith.

Another form of relief relates to the return and declaration respecting

election expenses, required by sec. 33. It is termed an *authorised excuse.* By sec. 33 (6) of the Act of 1883, if a candidate or his election agent fails to comply with the requirements of sec. 33, as to the making and transmitting of the return concerning election expenses, he shall be guilty of an illegal practice, and thus the election will be avoided. On the discovery of the irregularity, application should be made to the Division, or the Election Court, or to the Lord Ordinary on the Bills in vacation, in terms of sec. 34, for an "authorised excuse," so as to prevent the omission or error from being an illegal practice, and to protect the candidate from the consequences. Notice of the application must be given in the constituency. (See *Clark*, First Division, 2 Dec. 1896.)

Where it is proved that the offence took place without the sanction or connivance of the candidate, and that he took all reasonable means for preventing it, the Court *must* grant relief (s. 34 (3)). In all other cases it is discretionary, and the nature and amount of the evidence required is similar to that necessary under sec. 22.

Similarly, in *municipal* and other elections, provision is made for an authorised excuse being obtained for the same reasons and upon the same grounds by sec. 25 (7) of the Elect. (Scot.) (Corrupt, etc.) Act, 1890; and the application is competently made to, and may be disposed of by, the Sheriff-Substitute (s. 35 (3) *ib.*). But applications for relief under secs. 23, 24, anent corrupt and illegal practices, can be competently made only to the Election Court, *i.e.* the Sheriff (s. 35 (1) *ib.*).

Certificate of Indemnity.—See Election Petition.

Election Expenses.

Maximum Scale of Expenses.—In parliamentary elections the maximum scale is set forth in Part iv. Sched. I. of the 1883 Act.

I. *In a Burgh.*

If the number of electors on the register—	The maximum shall be—
Does not exceed 2000 . . .	£350.
Exceeds 2000	£380, and an additional £30 for every complete 1000 electors above 2000.

II. *In a County.*

If the number of electors on the register—	The maximum shall be—
Does not exceed 2000 . . .	£650.
Exceeds 2000	£710, and an additional £60 for every complete 1000 electors above 2000.

Provision is made for reducing the amount where there are two or more joint candidates (Part v. Sched. I. *ib.*).

What are Legal Expenses under the Act of 1883.—An election expense is one "incurred on account of or in respect of the conduct or management of an election" (s. 27, subs. 2; s. 28, subs. 1), or "for the purpose of promoting or procuring the election of a candidate" (s. 16, subs. 1; see *Kennington*, 1886, 4 O'M. & H. 94; *Ipswich*, 31 March 1886, not reported; *Hood* v. *Gordon* (Elgin), 1895, 23 R. 178, at p. 185). The maximum expenditure allowed is stated in the First Schedule, Part

IV. to the Act of 1883, and is given above. It is important to note that the candidate's personal expenses, the returning officer's charges, and the cost of conveying voters by sea, where permitted, are in all cases allowed to be added to the maximum stated in the schedule. "Personal expenses" includes the reasonable travelling expenses of the candidate, and the reasonable expenses of his living at hotels or elsewhere for the purposes of and relating to the election (s. 64). Although no account of these need be taken in the estimate of the expense of the election, they must be included in the returns made by the election agent. A detailed account of the first £100 spent as personal expenses is not, however, required. In *Rochester* (1892, Day's El. Cas. 103), it was doubted whether the hire of a house for a candidate during the election came within the expression personal expenses. These are defined in Parts I. II. III. of Sched. I. of the Act.

I. *Persons Legally Employed for Payment.*

(1) *One* election agent.
(2) In counties, *one sub-agent* for *each* polling district. (*None* in burghs: messengers and clerks only.)
(3) *One* polling agent for *each* station.
(4) In a burgh, *one* clerk and *one* messenger for *every* 500 electors or part thereof.
(5) In a county, *for the Central Committee Room*, *one* clerk and *one* messenger for *each* 5000 or part thereof. (*No* provision for a central committee room in a burgh.)
(6) In a county, for each polling district, *one* clerk and *one* messenger for *each* 500 or part thereof.

None of the above may vote.

II. *Additional Legal Expenses.*

(1) Returning officer's charges (as fixed by 38 & 39 Vict. c. 84).
(2) Personal expenses of the candidate (defined by sec. 64, Act of 1883).
(3) Printing, advertising, publishing, and distributing addresses and notices. (The employment of men for distributing, in addition to clerks and messengers mentioned above, is not necessarily an illegal employment, if not done colourably—*Pontefract*, Day's Elect. Cas. 1892, p. 129.)
(4) Stationery, messages, postage, and telegrams.
(5) Expenses of public meetings.
(6) In a burgh, expense of one committee room for each 500 electors or part thereof.
(7) In a county, *one* central committee room, and, in addition, *one* committee room for each polling district: an additional room is allowed in polling districts for every complete 500 electors above the first 500.

III. *For Miscellaneous Matters.*

For miscellaneous matters not mentioned in I. and II., a sum *not exceeding* £200 (in the case of a joint candidature, a smaller sum: see Part V. Sched. I. *ib.*); but this may not be used in payment of anything expressly prohibited.

Sir Richard Webster has given an opinion that the travelling and hotel expenses of volunteer speakers may be paid; but they must be returned either under this head, or as "personal expenses."

The totals of I. II. III. (excluding personal expenses and returning

officer's charges) must not exceed the maximums provided for by Part IV. Sched. I. of the Act.

In Municipal Elections.—One committee room is allowed for *every* 2000 on the register (ss. 8 (1), 51, Act of 1890). Expenses of printing, advertising, hire of halls; *two persons* as clerks and messengers, if less than 2000 electors, and one additional person for every 1000 or part thereof above 2000; *one* polling agent for *each* polling station (s. 17). The *maximum*, if the number of electors does not exceed 500, is £25, with threepence for each additional elector above that number, provided it is not a joint candidature, when a reduction is made (s. 9). Nothing is said in the Act about the candidate's *personal* expenses. These are, it is submitted, not intended to be included in the £25. An election agent is not expressly authorised, but seems to be inferred (s. 25 (2)). If one is employed, he must be paid out of the £25 maximum.

These provisions apply to all municipal, county council, parochial, and school board elections (ss. 1, 2, Act of 1890).

Questions arising out of the 1890 Act do not come before the Court of Session, but are tried by the Sheriff; and since the Act was passed there have been few. Bribery and corruption, in the general sense, is almost absent from Scottish elections, parliamentary or otherwise; and municipal petitions, when raised, have almost invariably been confined to the settlement of some technical difficulty. In two reported cases, however, questions of bribery and treating, agency, and illegal expenses, under the 1890 Act, were raised (*Berwick* v. *Boswell*, 1892, 8 S. L. R. 96; *M'Laren* v. *Fife*, 1892, *ib.* 103).

CANDIDATE—*Meaning of—and when Candidature begins.*—By sec. 63 of the 1883 Act, the expression candidate means, unless the context otherwise requires, any person elected to serve in Parliament at such election, and any person who is nominated as a candidate at such election, or is declared by himself or by others to be a candidate on or after the day of the issue of the writ for such election, or after the dissolution or vacancy in consequence of which such writ has been issued. As to what persons are disqualified from becoming candidates at a parliamentary election, see PARLIAMENTARY ELECTION. The definition above quoted is good enough as far as it goes. It does not define election, or election expense; and in quite a number of petitions the important question to be decided has been: At what time does an expense become an election expense in the sense of sec. 8 and of the return and declaration necessary by the terms of sec. 33? Or, in other words, when does the candidate begin his candidature, for the purpose of making the return of election expenses required by sec. 33? The definition of "candidate" in the Act gives little assistance, and in each case the decision has been entirely upon the special facts and circumstances disclosed—a most unsatisfactory method in a question of such vast importance to the candidate. At common law, an elected candidate may be unseated for bribery or treating committed months or even years before the election (*Youghal*, 1869, 1 O'M. & H. 293; *Sligo*, 1869, *ib.* 302; *Boston*, 1874, 2 O'M. & H. 161). As regards illegal practices, the position of matters has not been made any clearer by the recent decisions (1896) in *Elgin*, *Lichfield*, and *Lancaster*. In *Elgin* (*sub nominibus Hood* v. *Gordon*, 1895, 23 R. 178, at p. 184), the judges held that the election commenced when the dissolution of Parliament or issue of the writ was imminent (or perhaps when it was thought by the candidate to be imminent), a ruling which makes the statutory limitation of a candidate's expenditure practically a nullity.

At any rate, it leaves the candidate a very free hand. See also *Kennington*, 1886, 4 O'M. & H. 93. Both in *Lancaster*, 1896, 3 S. L. T. p. 241, and *Lichfield*, 1895, 3 S. L. T. p. 218, the English judges had the benefit of the decision in the *Elgin* case; but they did not follow it, although their opinions are so worded as not to appear in direct conflict. They declined to lay down any rule as to when an election begins, stating that each case must be decided on its own circumstances. At *Lichfield*, the election was held to commence many weeks before the dissolution; and in *Lancaster*, the fact that an individual was asked to stand and did not refuse (or accept), did not make him a candidate. These two last cases are more in accordance with the decisions in older cases (*Montgomery*, 1892, 4 O'M. & H. 168; *Walsall*, 1892, 4 O'M. & H. 125; *Stepney*, 1886, 4 O'M. & H. 38; *Rochester*, 1892, 4 O'M. & H. 156; *Hexham*, 1892, 4 O'M. & H. 146; *Norwich*, 1886, 4 O'M. & H. 84; *Haggerston*, 1896, 3 S. L. T. p. 245; *Stepney*, 1892, Day's El. Cas. 117; see also Day's El. Cas. 30). As to election expenses incurred before the appointment of the election agent, see *Ipswich*, 1886, 4 O'M. & H. 73; *Rochester*, *supra*; and *Barrow*, 1886, 4 O'M. & H. 82).

Upon this very important question, therefore, it may be said that no definite guiding principle can be laid down. The authorities cannot properly be reconciled. They decide only particular cases. What a prospective candidate wants to know is, from what date definitely he must include his expenses, in cultivating the constituency, under election expenses. A change in the law to this effect must come sooner or later. As things are at present, nothing could be more unsatisfactory. One result is that the sitting member is in a very much better position than the candidate on the other side. He may subscribe, contribute, or spend money to a certain extent in his constituency, while he is the sitting member, practically without challenge; while his political opponent, who intends to contest the seat at the next election, is deterred from employing the same means to procure favour in the constituency as the sitting member, in consequence of the unsettled state of the law declaring when a candidature is held to begin.

The C. P. P. A., 1883, deals also with various questions which are not directly concerned with corrupt and illegal practices pure and simple: *disqualification of electors*—the prohibition of guilty persons from voting, ss. 36–39; *proceedings on election petition*, ss. 40–44 (see ELECTION PETITION); *miscellaneous provisions*, ss. 45–49; and *legal proceedings*—how prosecutions are undertaken and conducted, ss. 50–58.

SLANDER OF CANDIDATE. — *Corrupt and Illegal Practices Act*, 1895.—This Act (58 & 59 Vict. c. 40) makes the offence of slandering a candidate, by publishing any false statement or fact about his personal character or conduct, for the purpose of influencing the election, an illegal practice, involving all the penalties for an illegal practice enacted by the Act of 1883. It may be committed by any person or by the directors of any body or association (s. 1). It is a good defence if the respondent can show he had reasonable grounds for believing, and did believe, the statement made by him to be true (s. 2). Interim or perpetual injunction from any repetition of the slander may be obtained from the High Court of Justice (in Scotland, one of the Divisions of the Court of Session, s. 68 (4) of the Act of 1883). A candidate is not liable for the consequences of an illegal practice under this Act (1895) when committed by any of his

agents, other than his election agent, unless it can be shown that the offence was authorised, or consented to, or paid for by the candidate or his election agent, or unless the Election Court report that the return of the candidate was procured or materially assisted by the making or publishing of the slander (s. 4).

In three cases this Act was considered: *Sunderland*, 1896, 3 S. L. T. p. 234; *St. George's*, 1896, 3 S. L. T. p. 276; and in *Silver* v. *Benn*, 1895, 12 T. L. R. 199. To say that a candidate paid "wretched wages to his workmen," or "cleverly shelved a thing," or "sheltered himself behind another," are not false statements in the sense of the Act (*Sunderland*). In *St. George's*, statements that "Mr. Benn had a very dark passage in his life," and "a skeleton in his own cupboard," were founded upon; but the Court held that, inasmuch as the statements were not authorised or consented to by the candidate or his agent, but disclaimed by him immediately in a statutory declaration that it was done without his knowledge and consent, the petition had failed. In the recriminatory petition in the same case, statements that Mr. Marks had been guilty of lying, cowardice, and bribery on specific occasions, and that Mr. Marks did not dare to promulgate the lies in his own name, but used another as his instrument, were held to fall within the Act. As it was not proved that the statements had been distributed after 6th July 1895, the date upon which the Act became law, Mr. Benn could not be held liable.

[Mattinson and Macaskie, *Corrupt and Illegal Practices*; Conybeare, *Corrupt Practices*; Rogers on *Elections*; Parker on *Elections*; Day, *Election Cases*, 1892–93; H. C. Richards, *Corrupt and Illegal Practices, Candidate and Agent's Guide*; Hedderwick, *Election Manual*; Leigh and Le Marchant, *Law of Elections*: Blair, *Election Manual*; Nicolson on *Elections* and *Analysis of Election Statutes*; Marwick on *Municipal Elections*; Graham, *Elections* (*Corrupt Practices Act*, 1890 (*Municipal, etc.*)).]

See Parliamentary Elections; County Council Elections; Municipal Elections; Parish Council Elections; School Board Elections; Franchise; Parliament, Member of.

Corruption.—See Bribery; Corrupt Practices; Arbitration; Appeal to Circuit Court; Attainder.

Council, Privy.—See Privy Council.

Council and Session.—The judges of the Court of Session are called the Lords of Council and Session, because they succeeded to all the authority and powers of the *Session* instituted by James I., and, according to Stair (iv. 1. 22), of the Daily Council established by James IV. It is thought by others that they are called Lords of Council owing to the original connection of the Supreme Court of Justice with the King's Council, *i.e.* Parliament or the Privy Council (Mackay, *Practice*, i. 18). The books of the Court are similarly called the Books of Council and Session.

Councillor of a Burgh.—A councillor is a member of the corporation or council elected to represent the individual members of the community of the burgh. Only persons who are entitled to vote in the

election of town councillors within the burgh are eligible for the office of town councillor. Generally speaking, any male person resident within the boundaries of the burgh, or carrying on business within the burgh, is eligible for election, though females may vote in the election of councillors. In such burghs of regality and barony as are not parliamentary burghs, the qualifications of councillors are defined by the charter or statute under which the burgh has been constituted or its affairs are administered.

In royal and parliamentary burghs the election takes place annually, in the month of November. Where the burgh is divided into wards, the councillors are elected for the respective wards. The election is conducted under the Acts 3 & 4 Will. IV. c. 77; The Municipal Election Amendment (Scotland) Act, 1868; The Municipal Elections Amendment (Scotland) Act, 1870; The Municipal Elections Amendment (Scotland) Act, 1881; The Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55, ss. 40, 41); and The Ballot Act, 1872. See ELECTION. The number of councillors for each burgh is that fixed by the Act 3 & 4 Will. IV. c. 77, with the relative Commission following thereon, and the Act 31 & 32 Vict. c. 188.

On the first Tuesday in November in each year, one-third, or a number as near as may be thereto, of the whole council of each burgh goes out of office, the third to retire consisting of those who have been longest in office. The outgoing councillors are eligible for re-election (3 & 4 Will. IV. c. 76, s. 16; 3 & 4 Will. IV. c. 12). Where there is not a sufficient number of councillors three years in office to constitute the one-third of the council to go out, the deficiency is to be made up by the next younger class of councillors; and the principle of selection is this, that the member or members must be taken from that younger class who had the smallest number of votes; and in a case of equality of votes or no contest, if only one is wanted, the majority of the council are to decide (Lord Pres. Inglis in *Mags. of Rutherglen*, 17 Feb. 1876, 3 R. 451). By the Act 47 & 48 Vict. c. 16, a person adjudged bankrupt is disqualified from being a councillor, and this applies even if he be in office (*Thom*, 28 Feb. 1885, 12 R. 701).

A councillor, on his admission to office, makes a declaration *de fideli administratione officii*. Prior to his making such a declaration, the validity of his election may be tried by way of suspension (*Monteith*, 29 Nov. 1837, 16 S. 122). But, after he has accepted office and made the declaration, reduction of his election is necessary (*Mags. of Glasgow*, 3 Dec. 1825, 4 S. 266). A councillor is held practically to be a trustee for the public whom he represents, and as such is subject to all the liabilities, responsibilities, and disabilities which attach to trustees or persons occupying fiduciary positions. He is bound in the performance of his duties to discharge these with a single eye to the public good, and cannot enter into any contract or transaction for his own benefit with the corporation of which he is a member, nor ought he to do anything directly or indirectly which may even conflict with the interests of those whom he is bound to protect (see Lord Chan. Cranworth in *Blaikie*, 17 D. (H. L.) 20.

Counsel.—See ADVOCATE.

Count and Reckoning.—See ACCOUNTING.

County Council.

I. THE COUNTY COUNCIL.

(A) Composition of Council.
(B) Number of Councillors.
(C) Councillors.
County Representation.
Burgh Representation.
(D) Qualification for a Councillor.
(E) Electorate.

The central authority constituted in each county is the county council. This body has the control of all the local business with which the Local Government Act, 1889, 52 & 53 Vict. c. 50, professes to deal.

(A) *Composition of Council.*—A county council is popularly elected. Those members who represent the county proper are chosen directly by popular vote, while the members who represent the burghs entitled to be represented are chosen by the town council of their respective burghs from among their own number, and thus in a manner the burgh representatives are indirectly elected by popular vote.

A county council remains in office for three years. The whole number of councillors go out of office, and a new election takes place on the first Tuesday in December in every third year (ss. 4, 30 (3)).

(B) *Number of Councillors.*—The number of councillors, in the case of each county, is fixed by the Secretary for Scotland, regard being paid to population, area, and the annual value as appearing in the valuation roll. The Secretary for Scotland also apportions the councillors allotted to each county between the county proper and the burghs which are entitled to be represented on the county council (s. 5). The Secretary for Scotland may, on a representation made to him, alter the number of councillors and their apportionment between the county proper and burghs (s. 51).

(C) *Councillors.*—A county council is composed of two classes of representatives—

1. County representatives, who sit for electoral divisions of the county. Police burghs are included in the county for election purposes, and form one or more electoral divisions (s. 4 (2)).

2. Burgh representatives, who are elected by the burghs within the county, which have been brought under the Act, for certain purposes.

County Representatives.—The qualification necessary for being elected a county councillor for an electoral division of a county, is being registered as a county elector (s. 7).

Burgh Representatives.—Certain burghs (royal and parliamentary) are represented by county councillors in the county council. The number of representatives is fixed by the Secretary for Scotland (s. 5). The county councillors are elected by the town council from among their number in the month of November. The elected councillors hold office for three years, and any casual vacancies are filled up by the town council (s. 8 (1) (2)).

The burghs which return representatives, and the purposes for which they send representatives, are burghs (royal and parliamentary) which contain less than 7000 inhabitants, for

1. Police administration.
2. Contagious Diseases (Animals) Acts.

Royal burghs which contain a population of more than 7000, but do not return, or contribute to return, a member to Parliament, for

The Contagious Diseases (Animals) Act.

Royal and parliamentary burghs, whatever the population, who do not maintain a separate police force, for

The administration of the police.

It must be noted that the county councillors elected to represent these burghs cannot act or vote in respect of any matters involving expenditure to which such burghs do not contribute, or for which they are not assessed (Local Government Act, 1889, s. 73 (8)).

(D) *Qualification for a Councillor.*—A woman is not eligible for election as a county councillor (s. 9), and an adjudged bankrupt is disqualified under the Bankruptcies, Frauds, and Disabilities (Scotland) Act, 1884, 47 & 48 Vict. c. 16, s. 5. Any person is disqualified as a county councillor while he—

1. Holds any office or place of profit under the county council, or any committee thereof.
2. Has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council or committee.

But a person is not disqualified by reason of having any share or interest in

1. Any lease, sale, or purchase of land, or any agreement for the same.
2. Any agreement for the loan of money, or any security for the payment of money only.
3. Any newspaper in which any advertisement relating to the affairs of the council or committee is inserted.
4. Any company which contracts with the council or committee for lighting or supplying with water, or insuring against fire, any property of the council or committee.
5. Any railway company, or any company incorporated by Act of Parliament, or Royal Charter, or under the Companies Act, 1862. Local Government Act, 1889, s. 9. Army officers are not disqualified (54 & 55 Vict. c. 5, s. 8).

(E) *Electorate.*—The electorate of a county council consists of—1. Persons registered as parliamentary electors, provided they have paid (*a*) consolidated rates and (*b*) poor rates (s. 28 (*a*) (*b*) (*c*)). 2. Peers possessing the qualification for being registered as parliamentary electors, but subject to the above conditions as to payment of rates (s. 28 (*d*) (*K*). 3. Women possessing the necessary qualification, but subject to the above conditions as to payment of rates (s. 28 (2) (i.) repealed L. G. Act, 1894, s. 11). (See Franchise.)

II. AREA OF THE GOVERNMENT OF A COUNTY COUNCIL.

For the purpose of the Local Government Act, 1889, the area of local government comprises—

1. *The County proper*, including therein—

(*a*) Police burghs under 7000—for all purposes except (1) public health, and (2) in certain cases, highways;

(*b*) Police burghs of, or over, 7000—for all purposes except (1) public health, (2) police administration where they have separate police, and (3) in certain cases, highways.

2. *Royal or Parliamentary Burghs under* 7000—for Police Administration and Contagious Diseases (Animals) Acts; as also

Such royal burghs over 7000 as do not return or contribute to return a burgh member to Parliament—for administration of Contagious Diseases (Animals) Acts; as also

All burghs, royal or parliamentary, which do not maintain a separate police force—for administration of police.

III. BOUNDARIES AND ELECTORAL DIVISIONS.

Boundaries.
(A) County.
(B) Burgh.
Electoral Divisions.
Alteration of Boundaries and Divisions.

Boundaries.—(A) *County.*—By sec. 44 of the Local Government Act, 1889, and for the purposes of that Act, counties were to have the same boundaries and contents as under the Roads and Bridges Act, 1878. A county is defined in that Act as "the county exclusive of any burgh wholly or partially situate therein, and shall not include a county of a city." Detached portions of a county situated in another county were under that Act considered as part of the county with which they have the longest common boundary. The boundary commissioners appointed under the Local Government Act were directed by sec. 49 of the Act to deal with detached portions of a county, and the question has now been definitely settled. The only detached portions of a county now existing are the parishes of Cumbernauld and Kirkintilloch, which, for the purposes of the Act, are held to be in the county of Dumbarton (s. 40).

(B) *Burgh.*—The boundaries of a burgh for the purposes of the Act are the boundaries as fixed for police purposes under any general or local Act of Parliament, or, when no police assessment is levied, as they are fixed for municipal purposes (s. 44 (6)).

Electoral Divisions.—A county is divided into electoral divisions, each returning a councillor to the county council (s. 4).

A police burgh either constitutes one electoral division or is divided into two or more electoral divisions; and no area beyond the police boundaries can be united with it in the same electoral division (s. 4 (2)). Electoral divisions may consist of a part of a parish, of parts of two or more parishes, of a parish and a part or parts of another parish or parishes, or of a part of a police burgh. Two or more parishes may be grouped into an electoral division, but two police burghs, or a police burgh and a parish, or part of a parish, or parts of two districts formed under sec. 77 of the Act for highways or public health, cannot be included in an electoral division (s. 47 (1)). These provisions are required, as it is necessary that an electoral division should comprise an area which is uniformly rated. A county councillor can only vote on matters for which his electoral division is liable to be assessed (s. 73 (8)), and this provision as to voting would be unworkable if his electoral division comprised areas which were differently rated. An electoral division is to be formed as far as possible approximately equal, having regard to valuation, area, and population, and the proper representation of the burghs in the county (s. 47 (1)).

Alteration of Boundaries, etc.—On the representation of a county council, or of a town council, the Secretary for Scotland may make a Provisional Order, which requires the confirmation of Parliament, providing for the alteration of the contents and boundaries of electoral divisions.

Power is also given to alter the boundaries of a county, burgh, or parish in a county, and to simplify their areas, and generally to make arrrangements consequential on any alterations made (s. 51).

Before making any Provisional Order, advertisement must be made for two successive weeks in a local paper and in the *Edinburgh Gazette*, and objections to the proposed Order must be considered; and if necessary, a local inquiry is to be taken, after due advertisement, at which parties are heard (s. 91 (1) (2), s. 93). A Provisional Order is submitted to Parliament for confirmation; and if, while the Bill confirming is pending in either House, a petition is presented against any Order therein, the Bill may be sent to a select committee, and the petitioner is allowed to appear and oppose (s. 91 (4)). A county council may promote Bills confirming Provisional Orders made in pursuance of any Acts of Parliament (s. 56 (6)).

The making of a Provisional Order is *primâ facie* evidence that all the requirements of the Act in respect of proceedings required to be taken before the making of the Order have been complied with (s. 91 (6)). For the provisions of the Act as to the boundaries of certain counties, see secs. 37 to 43; and for the settlement of boundaries, areas, etc., by the Boundary Commissioners, see the Orders published by them, or Sheriff Shennan's book on the *Boundaries of Counties and Parishes in Scotland*.

IV. DISTRICTS.

It is the duty of the county council to divide the county into districts, for the purposes of maintenance of the highways and the administration of the laws relating to public health. The district must comprise a group of electoral divisions, and each parish, so far as within the county, shall be included in one district. The division into districts does not take place where it appears to the county council unnecessary or inexpedient in the case of a county containing fewer than six parishes, or which has not been before divided into districts for the purposes of the maintenance of highways therein (s. 77 (11)).

V. STANDING JOINT-COMMITTEE AND DISTRICT COMMITTEES.

In addition to the county council, and as part of the machinery for transacting the business of a county, there are two other authorities: the "standing joint-committee" and the various "district committees" of the county. These are mixed bodies, being composed only partly of county councillors, and being only to that extent popularly elected.

Standing Joint-Committee.—The standing joint-committee is a joint-committee of the county council and of the commissioners of supply. The standing joint-committee is the police committee of the county under the Police Act, 1857, and is thus the executive body in the administration of county police (s. 18 (8)). It is also charged with another important duty: the county council cannot undertake any works involving capital expenditure, or exercise its borrowing powers under the Act, without the consent of the standing joint-committee (s. 18 (6), and s. 67). See STANDING JOINT-COMMITTEE.

District Committees.—District committees exist for two purposes, viz. as part of the machinery for the management and maintenance of highways, and for the administration of the Public Health Acts. For these purposes the county is divided by the county council into districts comprising groups of electoral divisions. A district committee comes in place of a district road committee under the Roads and Bridges Act, 1878, and it is also the local authority under the Public Health Acts

for the district. See DISTRICT COMMITTEE; ROADS AND BRIDGES; PUBLIC HEALTH.

VI. BUSINESS OF THE COUNTY COUNCIL.

(A) Meetings.
(B) Convener and Vice-Convener.
(C) Disqualification from Voting.
(D) Committees.

(A) *MEETINGS.*—There must be not less than three meetings of the county council annually—one on the third Tuesday in December, and the other two on such days in May and October as the council may determine (s. 73 (2)). A county council may make, vary, and revoke such regulations as they think fit with respect to the summoning, notice, time, place, management, and adjournment of their meetings, and generally with respect to the transaction and management of their business (s. 73 (7)). A quorum of the county council, unless the council with the consent of the Secretary for Scotland otherwise determine, consists of one-fourth of the whole number of the council (s. 73 (2)). A county council may act notwithstanding any vacancy or vacancies, caused by insufficent election or otherwise, provided a quorum exists (s. 73 (4)). The notice of a meeting of the county council at which any resolution for the payment of a sum exceeding fifty pounds out of the county fund, or any resolution for incurring any expenses, debt, or liability exceeding fifty pounds, will be proposed, must state the amount of the sum, expenses, debt or liability, and the purpose for which they are to be paid or incurred (s. 75 (4)).

(B) *CONVENER AND VICE-CONVENER.*—The chairman of the county council is called the *convener of the county*, and he holds office for one year (s. 10). He is elected annually by the council from among the councillors, at the meeting on the third Tuesday of December. The election of a chairman is the first business to be transacted at the meeting (s. 73 (5)). He is eligible for re-election, and is, in virtue of his office, a justice of the peace for the county. A vice-convener is also elected on the same date. A casual vacancy in the office of convener or vice-convener, whether caused by death, resignation, or disqualification, is filled up by the county council, and the person so appointed retains his office so long only as the vacating convener or vice-convener would have retained office if such vacancy had not occurred (s. 10). Where the convener and vice-convener are absent, the councillors present choose a chairman from among their number. The chairman of a meeting has a casting as well as a deliberative vote. When at the election of the chairman of a meeting an equal number of votes is given in favour of two or more persons, the meeting shall determine by lot which of these persons shall be chosen (s. 73 (5)).

(C) *DISQUALIFICATION FROM VOTING.*—At meetings of a county council, councillors or members of district committees appointed to represent a burgh or an electoral division, consisting of a police burgh or part of a police burgh, shall not vote or act in respect of any matters involving expenditure to which such burgh does not contribute, or for which it is not assessed (s. 73 (8)).

(D) *COMMITTEES.*—A county council has general powers of delegating business to committees, but it cannot delegate to a committee any power of raising money by rate or loan (s. 73). A county council may make, vary, and revoke regulations respecting the quorum and proceedings of a committee,

but, subject to such regulations, the proceedings and quorum and the place of meeting, whether within or without the county, shall be such as the committee may from time to time direct, and the chairman at any meeting of the committee has a casting as well as a deliberative vote (s. 74). These provisions do not apply to the standing joint-committee, or to any other joint-committee, but they do apply to a district committee (ss. 76 (9); 80).

Finance Committee.—A county council annually appoints a "finance committee" for regulating and controlling the finance of the county (s. 75 (3)). As the local financial year begins in May, the appointment will be made at the meeting in that month (s. 62 (1)). Payments out of the county fund can only be made in pursuance of orders of the county council, signed by three members of the finance committee, and countersigned by the county clerk. But to this rule there are important exceptions, viz. in the case of (1) payments in pursuance of the specific requirements of an Act of Parliament: (2) payments in pursuance of a decree of a competent Court; (3) payments on the requisition of a district committee, or the standing joint-committee; (4) periodical payments of salaries and wages (s. 75 (1)). No expenses, debt, or liability can be incurred by a county council exceeding £50 except upon a resolution of the county council, passed on an estimate submitted by the finance committee (s. 75 (3)). The exceptions above noted apply to this rule. Cheques for payment of moneys must be signed by two members of the finance committee, and be countersigned by the county clerk, or by a deputy approved by the council (s. 75 (1)). The finance committee of the county council must prepare annually estimates of the receipts and expenses of the county fund, and of the sums required to be raised to meet the deficiency of such fund for the expenditure chargeable thereon (s. 26 (6)).

The Valuation Committee.—This committee is appointed in May (42 & 43 Vict. c. 42, s. 5. See VALUATION.

Executive Committee under the Contagious Diseases (Animals) Act.—Where such a committee is appointed (41 & 42 Vict. c. 27, Sched. 6 (5)), the council may appoint persons to act who are not members of the local authority (s. 73 (1)). See CONTAGIOUS DISEASES (ANIMALS) ACT.

Besides these committees, the council must elect (*a*) not more than seven of its members to act on the standing joint-committee: (*b*) members of the district lunacy board as fixed by the General Board of Lunacy (40 & 41 Vict. c. 53, s. 61); (*c*) a prison visiting committee, as directed by the Secretary for Scotland (s. 11 (5) (2): s. 113: 40 & 41 Vict. c. 53, s. 14); (*d*) three visitors of the district lunatic asylums, who are elected at the October meeting (s. 11 (5) (2); 20 & 21 Vict. 71, s. 26).

Joint-Committees.—A county council or county councils, and parish councils or town councils or police commissioners of a burgh, may join in appointing, out of their respective bodies, a joint-committee of a number to be fixed by arrangement for any purpose of the Act in respect of which they are jointly interested. The county council may delegate any power which they may exercise to the committee, provided that they do not delegate any power of raising money by loan or rate (s. 76), Local Government Act, 1894, s. 34). The joint-committee elects a chairman. In case of equality of voting at the election of a chairman, he is chosen by lot. The chairman has a casting as well as a deliberative vote. A council appointing a joint-committee may make regulations as to the quorum, proceedings, and place of meeting. The costs of a joint-committee are payable by the parties appointing the committee, as they may agree (s. 76).

VII. OFFICERS.

(A) Officers of Former Authorities.
(B) Appointment and Dismissal.
(C) County Clerk.
(D) Assessor.
(E) Medical Officer and Sanitary Inspector.
(F) Returning Officer.

(A) *Officers of Former Authorities.*—Persons who were officers of any of the authorities whose powers were transferred to the county council, became the servants of the county council. These officers hold their office by the same tenure as if the Local Government Act, 1889, had not been passed. The council may redistribute the business of these officers, and may abolish unnecessary offices, subject to compensation where an officer so transferred suffers pecuniary loss by such arrangements (L. G. Act, 1889, ss. 118, 120).

(B) *Appointment and Dismissal.*—The county council may appoint a county clerk, treasurer, collector or collectors, assessors, surveyors, and such other inspectors, officers, and servants as may be necessary for the efficient execution of the duties of the county council. A county councillor or the partner in business of a county councillor cannot be appointed to any office or place of profit under the county council or any committee thereof; and the disqualification shall apply during six months after such person has ceased to be a county councillor (s. 83 (5)). Regulations may be made with regard to the duties of these officials, and, if expedient, one person may be appointed to fill two or more offices, and two or more persons may be appointed jointly to fill one office. The council may pay such salaries as they think proper, and the officials shall hold office at the pleasure of the council. The council may at any time discontinue the appointment of any officer appearing to them not necessary to be re-appointed (s. 83 (6) (7)).

(C) *The County Clerk.*—The clerk of the county council discharges all the rights and duties formerly exercised by the clerk of supply, who was the clerk of the commissioners of supply. He becomes county clerk for all purposes except (1) as regards highways, so long as the existing county road clerk is continued by the county council (s. 83 (2)); and (2) as regards duties transferred from the justices, so long as the existing clerk of the peace holds office (ss, 83, 84).

(D) *The Assessor.*—The consent of the Treasury is required to an appointment of an officer of inland revenue as assessor, and an appointment made without such consent has no effect (s. 83 (4)). In the event of an appointment of an officer of inland revenue, any regulations made by the county council as to his duties are subject to the approval of the Treasury (s. 83 (3)). A resolution of the county council to have the Valuation Roll printed is not a "regulation" in regard to the duties of an assessor requiring the approval of the Treasury (*The County Council of Lanarkshire*, 19 R. 617).

(E) *Medical Officer and Sanitary Inspector.*—The county council must appoint a medical officer and a sanitary inspector, who are not permitted to engage in private practice, except with the written consent of the council. The medical officer must be a registered medical practitioner, and the holder of a diploma in sanitary science, public heath, or State medicine, under sec. 21 of the Medical Act, 1886. No sanitary inspector, except with the consent of the Local Government Board, can be appointed

as the sanitary inspector for the county, unless he has been, for three consecutive years previous to his appointment, the sanitary inspector of a local authority under the Public Health Acts (ss. 52, 54). The medical officer and sanitary inspector are only removable from office with the sanction of the Local Government Board (s. 54 (3)).

(F) *Returning Officer.*—The county council, at its meeting in October preceding an election, appoints the returning officer (s. 30 (2)).

VIII. FINANCE.

(A) County Fund.
(B) Receipts.
(C) Expenditure.
(D) Budget.
(E) Rates.
- Consolidated Rates.
- General Purposes Rates.
- Special Rating.
- Exemptions.
- Demand Note.
- Date of Payment.
- Recovery of Rates.
- Appeal.
- Rating in Burghs.

(F) Borrowing.
(G) Accounts and Audit.

The financial affairs of the county are under the management and control of the county council, and all the property and assets of the former administrative authorities in a county are taken over by the council (s. 25).

The county council annually appoints a finance committee for regulating and controlling the finance of the county (s. 75). See *Committees—Finance* (*supra*).

(A) *County Fund.*—The county fund is the sum of all the cash funds of the county. The funds have to be lodged in bank (s. 26 (5)); and in order to keep the different departments of county finance distinct, it is necessary that separate bank accounts should be kept for such important branches of expenditure as police, the maintenance of roads, road debt, public health, etc.

(B) *Revenue.*—The receipts of the county, from whatever source, must be carried to the county fund (s. 26 (2)). Payments are made to the county treasurer. Where capital sums are recovered by a council in course of any adjustment of liabilities with other bodies, they must be applied either in repayment of debt, or for any other purpose for which capital money may be applied (s. 50 (5)). The county sources of income other than county rates are—

1. Payments from the Treasury into the Local Taxation (Scotland) Account, 52 & 53 Vict. c. 50, ss. 20, 21 (local taxation licences); 57 & 58 Vict. c. 30, s. 19 (portion of probate estate duty); 53 & 54 Vict. c. 8, s. 7; 53 & 54 Vict. c. 60, s. 5 (customs and excise duties grant). These payments are specifically applied to certain objects (52 & 53 Vict. c. 50, s. 22; 53 & 54 Vict. c. 60, s. 2; 55 & 56 Vict. c. 51 s. 2).

2. Penalties incurred under the Act (s. 94) and under other Acts, and also fees exigible under any Statute administered by the county council (*e.g.* The Weights and Measures Act, 1878).

3. Contributions from burghs which contribute towards the expenditure for the administration of the police and of the Contagious Diseases (Animals) Act (ss. 60 to 66).

(C) *Expenditure.*—Payments are made in the first instance out of the county fund (s. 26 (2)). Payments are made through the treasurer. Cheques

must be signed by two members of the finance committee, and countersigned by the county clerk, or by a deputy appointed by the council. No expense, debt, or liability exceeding £50 can be incurred except upon a resolution of the county council, passed on an estimate prepared by the finance committee. No payment can be made out of the county fund, whether of capital or income, except on an order of the council passed on the recommendation of the finance committee. The order must be signed by three members of the finance committee, and countersigned by the county clerk. The order may include several payments. This rule has the following exceptions:—

1. Payments in pursuance of the specific requirements of an Act of Parliament (the actual sum and purpose being specified in the Act).
2. Payments in pursuance of a decree of a competent Court.
3. Payments on the requisition of a district committee or standing joint-committee (their requisitions for money required in connection with the expenditure on roads, public health, or police, must be complied with, without the interposition of the county council).
4. Periodical payments of salaries and wages (s. 75).

An order for payment by the council may be stayed by note of suspension in the Bill Chamber on grounds of illegality. Besides the expenditure incurred in administering the business specifically transferred, the county council must defray the charges formerly borne by the county general assessment, namely—

I. Salaries and outlays of county officials.
II. Salaries and outlays of procurator-fiscals in the Sheriff and Justice of Peace Courts, and of the clerk of the peace, so far as these were formerly paid by the county.
III. The expenses of searching for, apprehending, subsisting, prosecuting, or punishing criminals.
IV. The expenses of maintaining, insuring, cleaning, etc., court-houses or other county buildings.
V. The expenses, to a fixed limit, of striking the "fiars prices" for each county.
VI. The expenses previously directed by Acts of Parliament to be defrayed out of "rogue money" (31 & 32 Vict. c. 82, s. 3).
VII. The expenses of executing the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49); The Prisons (Scotland) Act, 1877 (40 & 41 Vict. c. 53); The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 3); and some others.

No "capital works," *i.e.* works involving capital expenditure, can be undertaken by a county under the powers transferred by the Local Government Act, 1889, or under any other Act, without the consent in writing of the standing joint-committee. "Capital works" include the erection, rebuilding, or enlargement of buildings; the construction, reconstruction, or widening of roads and bridges; the construction or extension of water-supply works; and also the acquisition of land, or of any right or interest or servitude in or over land or water, for the purposes of any "capital work" (s. 18 (6) (7)).

(D) *Budget.*—The finance committee must present to the county council, at their meeting in October, an annual budget containing estimates of the receipts and expenses of the county fund, and of the sums required to be raised to meet the deficiency of such fund for the expenditure. The county council revise the estimates and authorise the expenditure, and make provision for meeting it (ss. 26, 71).

(E) *Rates.*—The deficiency in the county fund in respect of each branch of expenditure is met by rates imposed by the council, which are levied in the form of consolidated rates, divided into owners' consolidated rate and occupiers' consolidated rate (s. 27).

Owners' Consolidated Rate.—The rates formerly levied by the commissioners of supply, except those under the Contagious Diseases (Animals) Act, were payable by the owner only. It is now provided that the Sheriff shall ascertain what has been, during ten years before Whitsunday 1889, the average amount of each such rate, and shall cause it to be recorded. When ascertaining the average rate in respect of each branch of expenditure, the Sheriff excludes any portion of a rate applicable to the payment of interest and repayment of principal of money borrowed in respect thereof previous to 1889. Until any money so borrowed is repaid, a rate sufficient to provide for payment of interest and repayment of principal shall be payable by owners only, and will be included in the owners' consolidated rate. The "average rate" thus fixed by the Sheriff shall be paid in perpetuity by the owners (s. 27). There may be average rates in respect of the following assessments:—

County general assessment.
Police rate.
Registration of voters.
Lunatic asylums.
Militia.
Sheriff court-houses.

Occupiers' Consolidated Rate.—Any increase on these average rates, and all other rates, old and new (including road rates, public health rates, contagious diseases rates), and whether to meet ordinary expenditure or to meet the interest of money borrowed after the passing of the Act, are to be paid equally by owners and occupiers (s. 27 (4), iii.).

General Purposes Rate.—Any rate necessary for a purpose for which no statutory provision is made, is imposed as a general purposes rate (s. 27 (1)). Among such purposes are the charges of county council elections, and the expenses properly incurred by justices and commissioners of supply.

Special or Parish Rating.—Any rate for the management and maintenance of highways, the administration of the laws relating to public health, and for any special purpose in respect of which the county has been divided into divisions or districts under any Act, shall be imposed within each such division, district, or parish (s. 26 (4), 27 (1)).

Persons Liable.—The persons liable to assessment are the owners and occupiers, as explained above. All the rates are levied on the gross annual value of lands and heritages as appearing on the valuation roll, without deduction or classification of any kind; except in the case of assessments levied under the Public Health Acts, which are still imposed, subject to the provisions of these Acts as to classification, deductions, and differential rating (ss. 17 (4), 27 (3)). See under Public Health: Rating.

Exemption from Rates.—Every ratepayer must be assessed, but any occupier under £4 may, *on application*, be relieved from payment of rates on the ground of poverty. The owner of an unoccupied and unfurnished house is liable only in owner's rates, and is exempt from payment of occupier's rates (s. 62 (4)).

The Demand Note.—The demand note must set forth the several branches of expenditure in respect of which the consolidated rates are imposed, the amount in the pound applicable to each several branch, and the amount to be paid by the person named in the note, and the time and

manner of appealing and paying, and such other particulars as shall be prescribed (s. 62 (2)). The average rate shall be separately set forth and demanded (s. 27, iii.).

Date of Payment.—The rates imposed are, for the local financial year, from the 15th May preceding the date of imposing the same. They are payable on a day fixed by the county council, not earlier than the 1st November (s. 62 (1)).

Recovery of Rates.—The county council have powers of summarily recovering rates by legal process (s. 26 (5)).

Appeals.—The council may fix a time and place for hearing appeals against rates, and may decide whether they are to be heard by the council or by a committee or committees thereof (ss. 62 (3), 73 (11)).

Regulations as to Rating.—The county council may make regulations in regard to rating, provided that public notice of their import has been given, for two successive weeks, by advertisement in a local newspaper and in the *Edinburgh Gazette*, and that they have been confirmed by the Sheriff (ss. 63, 94). See RATING.

Rating in Burghs.—The lands and heritages within police burghs are assessed, in respect of expenditure on the administration of the police (except where a separate police force is maintained) and of the Contagious Diseases (Animals) Acts, in the same manner as other lands and heritages within the county (60 (5)). Royal and parliamentary burghs liable to contribute to the county fund for the administration of police and of the Contagious Diseases (Animals) Act, or for the latter only, are not assessed by the county council as in the case of the county. The procedure is as follows:—The rateable property of the burgh, as appearing on the valuation roll of the burgh, is included in the rateable property of the county; and the amount of consolidated rates applicable to the purposes mentioned is ascertained and fixed as if the burgh were one of the parishes in the county. The county council annually, and not later than the month of October in each year, send a requisition to the town council of the burgh, requiring them to pay the sum or sums which they are liable to contribute to the county fund in aid of the expenditure set forth in the requisition, and the town council must pay the sum or sums out of the police assessment, or, if there is none, out of the common good, before the 15th January next ensuing (ss. 60 and 66).

(F) *BORROWING.*—The county council cannot delegate any power to raise money by loan (s. 73).

Consent of Standing Joint-Committee.—The county council may, with the consent in writing (signed by two members and the county clerk) of the standing joint-committee, borrow, on the security of any rate, such sums as may be required for the following purposes:—

I. For any purpose for which any authority, whose powers are by the Act transferred to the council, were authorised to borrow. The principal borrowing powers transferred are those conferred by 20 & 21 Vict. c. 72, s. 57 (police stations); 20 & 21 Vict. c. 71, s. 61 (lunatic asylums); 23 & 24 Vict. c. 79, s. 26 (sheriff court-houses); 30 & 31 Vict. c. 101, s. 86 (sewers); s. 89 (water supply); 34 & 35 Vict. c. 38, s. 2, and 38 & 39 Vict. c. 74 (hospitals); 40 & 41 Vict. c. 53, ss. 20, 21, 40, 55 (prisons); 41 & 42 Vict. c. 78, s. 58 (new roads); s. 75 (road debt).

II. For any purpose for which the county council is authorised to borrow under the Act, *e.g.* s. 50 (4).

III. For making advances to any persons in aid of the emigration or colonisation of the inhabitants of the county, with a guarantee for repay-

ment of such advances from any authority in the county, or the Government of any colony (s. 67 (1) (c)).

Loans from the Public Works Commissioners.—The county council may also obtain loans on special terms from the Public Works Commissioners; but in the case of such a loan, besides the consent of the standing joint-committee, the "recommendation" of the Local Government Board is required (38 & 39 Vict. c. 74, s. 3).

Without Consent.—If in any year payments have to be made by the county council in connection with the current annual expenditure, for the purposes of any of the Acts of Parliament administered by them, before the rates applicable to that head of expenditure for the year are paid, the county council may, *without consent*, borrow from a bank or other company or person, on security of the rate still due and unreceived, but not to an amount greater than half of such rate. When any money has been so borrowed, the council cannot borrow on the security of the rates of any other year, until the loan has been paid off (s. 67 (4)). Loans raised on the security of a rate must be charged to the special account to which the expenditure for that purpose is chargeable (s. 67 (5)).

Return to Secretary for Scotland.—Within twenty-one days after the expiry of the financial year, the council must make a return to the Secretary for Scotland of loans, and the measures taken for their repayment (s. 67 (6)).

Repayment.—A loan under heads I., II., and III., *supra*, must be repaid within a period not exceeding thirty years, determined by the Council, with the consent of the standing joint-committee (s. 67 (2)). The loan may be paid off by equal yearly or half-yearly instalments of principal, or of principal and interest combined, or by means of a sinking fund, set apart, invested, and applied in accordance with regulations which may be framed by the Secretary for Scotland.

Creation of Stock.—Where they have statutory borrowing power, a county council may create stock, but to do this they require the confirmation of the Secretary for Scotland (Local Authorities' Loans (Scotland) Act, 1891, 54 & 55 Vict. c. 34, and Local Authorities' Loans (Scotland) Amendment Act, 1893, 56 Vict. c. 8).

(G) *Accounts and Audit.*—The accounts of the county fund and of the money raised by rates must be kept in such a way as will prevent a rate being applied to any purpose to which it is not properly applicable (s. 26 (5)). Accounts of receipts and expenditure of a County Council must be made up and balanced to the 15th day of May in every year, and they must be completed and signed before that date by such person or officer as the Secretary for Scotland prescribes. An auditor is appointed by the Secretary for Scotland, who also makes regulations as to his duties. The county clerk gives fourteen days' notice of the time of audit, and also of the name and address of the auditor. An abstract of the accounts, balanced and signed as stated above, with all books and papers referred to in the accounts, must be deposited in the offices of the county council, and open within certain hours to the inspection of ratepayers for seven days before the audit. Extracts and copies of the accounts may be taken. Any officer of the county council is liable in penalties for refusing to allow inspection of the accounts. Any ratepayer may take objection to the accounts, or any part of them. A note of objections in writing must be sent to the auditor, and a copy to the officer concerned, two clear days before the time fixed for audit. Any ratepayer may appear at the audit to support his objections, or another ratepayer may do so for him (s. 70). The rules to be observed by the auditor are to be found in sec. 70.

IX. POWERS AND DUTIES.

I. Powers and Duties transferred from Commissioners of Supply—
- (A) Assessing for General County Purposes.
- (B) Police Administration.
- (C) Valuation.
- (D) Registration of Parliamentary Voters.
- (E) Lunacy.
- (F) Prisons.
- (G) Sale of Food and Drugs.
- (H) Militia.
- (I) Sheriff Court-houses.
- (J) Reformatories and Industrial Schools.

II. Powers and Duties transferred from the County Road Trustees—
- (A) Roads and Bridges.
- (B) Highland Piers and Quays.
- (C) Locomotives.
- (D) Artillery and Rifle Ranges.
- (E) Electric Lighting.

III. Powers and Duties transferred from the Local Authorities of Counties under the Contagious Diseases (Animals) Acts, etc.

IV. Powers and Duties transferred from the Local Authorities under the Public Health Acts.

V. Administrative Powers and Duties transferred from the Justices of the Peace—
- (A) Gas Meters.
- (B) Explosive Substances.
- (C) Weights and Measures.
- (D) Habitual Drunkards.
- (E) Wild Birds Protection.
- (F) Visitors to Lunatic Asylums.
- (G) Registration of Scientific Societies.

VI. Further Powers.

The powers and duties of the county council, as the central authority in a county, are very extensive. The powers and duties transferred to the county council by the L. G. Act, 1889, are—

1. The whole powers and duties which, before 1889, were vested in the commissioners of supply (s. 11 (1) (12)). (With certain exceptions. See *infra*.)

2. The whole powers and duties of the county road trustees (s. 11 (2) (16)).

3. The whole powers and duties of the local authority of the county under the Contagious Diseases (Animals) Acts and the Destructive Insects Act, 1877 (s. (11) (3), 14, 59).

4. The whole powers and duties of the local authorities under the Public Health Acts of parishes, so far as within the county (excluding burghs and police burghs (s. 4 (4)).

5. The administrative powers and duties of the justices of the peace of the county in general or special or quarter sessions assembled in respect of—

1. The execution, as local authority, of the Acts relating to gas meters, to explosive substances, to weights and measures, to habitual drunkards, to wild birds.

2. Appointment of visitors of public, private, or district lunatic asylums.
3. The registration of rules of scientific societies under 6 & 7 Vict. c. 36 (s. 11).

I. The Powers Transferred from the Commissioners of Supply are—

(A) The power of assessing for general county purposes, 31 & 32 Vict. c. 82 (except the part repealed by sec. 12, subs. 1, of the Act of 1889). See *supra, Finance*; *Rating*.

(B) *Police Administration.*—20 & 21 Vict. c. 72.—The county council provide for the general police administration, and keep books of its accounts and proceedings. The county council is the only body which can assess or borrow for police purposes. The practical administration of the Police Act is in the hands of the standing joint-committee. See Police, County; Constable, County).

(C) *Valuation.*—The Valuation Act and the Acts amending, 17 & 18 Vict. c. 91; 20 & 21 Vict. c. 58; 30 & 31 Vict. c. 80; 42 & 43 Vict. c. 42; 48 & 49 Vict. c. 3, s. 9 (5) (6); 40 & 49 Vict. c. 16; 49 & 50 Vict. c. 51; 50 & 51 Vict. c. 51; Land Valuation (Scotland) Amendment Act, 1895.—The county council appoints assessors (20 & 21 Vict. c. 58, and L. G. Act, 1889, s. 83), and a committee, called the county valuation committee, to hear and determine appeals under the Valuation Acts (42 & 43 Vict. c. 42). See Valuation.

(D) *Registration of Parliamentary Voters.*—24 & 25 Vict. c. 83, and 48 & 49 Vict. c. 16.—The principal duty in this connection is the appointment of assessors for the purposes of registration. See Registration.

(E) *Lunacy.*—20 & 21 Vict. c. 71; 25 & 26 Vict. c. 54; 40 & 41 Vict. c. 53, s. 51; and 50 & 51 Vict. c. 39.—The county council elect annually members of the district boards of lunacy at the time and in the number prescribed by the General Board of Lunacy. See Lunacy.

(F) *Prisons.*—40 & 41 Vict. c. 53.—The county council elects prison visitors (s. 113). See Prisons.

(G) *Sale of Foods and Drugs.*—38 & 39 Vict. c. 63, and 50 & 51 Vict. c. 9.—Each county council may (and, if required by the Secretary for Scotland, must) appoint one or more competent analysts for the purpose of enforcing these Acts. The county council may claim payment of all penalties recovered under these Acts.

(H) *Militia.*—17 & 18 Vict. c. 106; 23 & 24 Vict. c. 94; and 35 & 36 Vict. c. 38.—The principal duty left to the county council is to defray certain expenses connected with the Militia Acts. See Militia.

(I) *Sheriff Court-houses.*—23 & 24 Vict. c. 79, and 47 & 48 Vict. c. 42.—The powers and duties of the county council are to provide suitable Sheriff Court accommodation when required, and to execute necessary repairs on existing court-house. See Sheriff Court-houses.

(J) *Reformatories and Industrial Schools.*—40 & 41 Vict. c. 53, s. 7, and 48 & 49 Vict. c. 61.—County councils may contribute to the funds of certified reformatories and schools, with the approval of the Secretary for Scotland. See Reformatories and Industrial Schools.

II. Powers and Duties Transferred from the County Road Trustees.

(A) *Roads and Bridges.*—41 & 42 Vict. c. 81.—The county council undertake the general management of the highways and bridges within the county, which in the general case is divided into districts for this purpose.

The county council appoint a county road board, consisting of not more than thirty councillors for this purpose. The road board is the executive of the county council in all matters relating to roads and bridges, and can exercise all the powers and privileges of the county council in regard to roads and bridges, except levying an assessment (L. G. Act, 1889, s. 16 (2)). See ROADS AND BRIDGES.

(B) *HIGHLAND PIERS AND QUAYS.*—The county council maintain the piers and quays enumerated in sec. 19 of the Highland Roads and Bridges Act, 25 & 26 Vict. c. 105.

(C) *LOCOMOTIVES.*—24 & 25 Vict. c. 70; 28 & 29 Vict. c. 83; and 41 & 42 Vict. c. 58.—The county council, as the road authority, enforces the provisions of the Locomotives Acts, and they may make bye-laws regulating the use of county roads by locomotives (41 & 42 Vict. c. 58, ss. 6 and 7). See LOCOMOTIVES.

(D) *ARTILLERY AND RIFLE RANGES.*—48 & 49 Vict. c. 36.—The county council has a voice in the matter of bye-laws affecting artillery and rifle ranges. 48 & 49 Vict. c. 36 has been repealed, except sec. 3, by the Military Lands Act, 1892 (55 & 56 Vict. c. 48). The Ranges Act, 1891 (54 & 55 Vict. c. 54), has also been repealed by the Act of 1892, except s. 11. See ARTILLERY AND RIFLE RANGES.

(E) *ELECTRIC LIGHTING.*—45 & 46 Vict. c. 56, and 51 & 52 Vict. c. 12. —Under the Electric Lighting Acts, the county council is now the local authority, so far as regards streets and roads which are not within the jurisdiction of a town council, or of police commissioners, or of any board charged with the lighting of a district by gas (45 & 46 Vict. c. 56, s. 36).

III. POWERS AND DUTIES TRANSFERRED FROM THE LOCAL AUTHORITIES OF COUNTIES UNDER THE CONTAGIOUS DISEASES (ANIMALS) ACTS, ETC.

Contagious Diseases (Animals) Acts, 41 & 42 Vict. c. 74; 47 & 48 Vict. c. 13; 47 & 48 Vict. c. 47; 49 & 50 Vict. c. 32; Destructive Insects Act, 40 & 41 Vict. c. 68. The county council, as local authority, must, subject to the direction of the Privy Council, enforce the provisions of the Contagious Diseases (Animals) Acts, and of all Orders in Council which relate to these Acts or to the Destructive Insects Act. In the administration of these Acts the county council may act through committees. See CONTAGIOUS DISEASES (ANIMALS) ACTS.

IV. THE POWERS AND DUTIES TRANSFERRED FROM LOCAL AUTHORITIES UNDER THE PUBLIC HEALTH ACTS OF PARISHES, SO FAR AS WITHIN THE COUNTY (EXCLUDING BURGHS AND POLICE BURGHS).

Prior to the Local Government Act, 1889, the local authority for the administration of public health was the parish, but by that Act the whole powers and duties of the county local authorities were transferred to the county council (s. 11 (4)). The county, in the general case, is divided for public health purposes into districts, each district being controlled by a district committee, which becomes the local authority of the district, and is the executive in administering the Public Health Acts. It is to be observed that the parish council is local authority under the Vaccination (Scotland) Act, 1863 (26 & 27 Vict. c. 108), and the Acts relating to Burial Grounds, 18 & 19 Vict. c. 68; 19 & 20 Vict. c. 103; 29 & 30 Vict. c. 50; 49 & 50 Vict. c. 21. The function which the council performs is to regulate the public health finance of the county, and to secure uniformity in public health administration throughout the districts of the county by means of the services of a county medical officer and county sanitary inspector, who are

charged with the general superintendence of the county in public health matters. The Local Government Board (formerly the Board of Supervision) superintends the working of the Public Health Acts throughout the country. It has power to compel local authorities to fulfil their duties under the Acts. The Acts administered by the council and district committees are—

30 & 31 Vict. c. 101, Public Health Act,	1867
34 & 35 Vict. c. 38, „ „	1871
38 & 39 Vict. c. 74, „ „	1875
45 & 46 Vict. c. 11, „ „	1882
53 & 54 Vict. c. 20, „ „	1890
54 & 55 Vict. c. 52, „ „	1891
52 & 53 Vict. c. 72, Infectious Diseases Notification Act,	1889
48 & 49 Vict. c. 72, Housing of the Working Classes Act,	1885
53 & 54 Vict. c. 70, „ „ „	1890
41 & 42 Vict. c. 74, s. 31 } Dairies	1878
49 & 50 Vict. c. 32, s. 9 }	1886
40 & 41 Vict. c. 37, Alkali Works Act	1881
39 & 40 Vict. c. 75, Rivers Pollution Act	1876
56 & 57 Vict. c. 31, „ „	1893

See Public Health: Infectious Diseases Notification Act: Housing of the Working Classes Acts; Dairies, etc.; Alkali Works Act: Rivers Pollution Acts.

V. Administrative Powers and Duties transferred from the Justices of the Peace.

(A) Under the Gas Meters Act, 22 & 23 Vict. c. 66. See Gas Meters Act.

(B) Under the Explosive Substances Act, 38 & 39 Vict. c. 17. These relate to the licensing of factories and magazines for explosives, and the registration of retail premises with the local authority. See Explosive Substances.

(C) Under the Weights and Measures Act, 41 & 42 Vict. c. 49. The county council must provide for local use standards of measure and weight, and they must provide for the stamping of measures and weights which have been properly verified. Inspectors of weights and measures must be appointed. Bye-laws may be made. See Weights and Measures.

(D) Under the Habitual Drunkards Acts, 42 & 43 Vict. c. 19, and 51 & 52 Vict. c. 19. These Acts relate to the licensing of retreats for inebriates. See Habitual Drunkards.

(E) Under the Wild Birds Protection Acts, 43 & 44 Vict. c. 35, and 44 & 45 Vict. c. 51. Application may be made by a county council to the Secretary for Scotland to vary the limits of the close-time for birds in the county, or to exempt the county, or any part of it, wholly or partially from the operation of the Acts. See Birds, Protection of Wild.

(F) The appointment of visitors of lunatic asylums, 20 & 21 Vict. c. 71, s. 26. See Lunacy.

(G) The registration of the rules of scientific societies, 6 & 7 Vict. c. 36. See Scientific Societies.

VI. Further Powers.

The county council may sue or be sued, purchase, take, hold, and dispose of lands and other property for the purposes and subject to the

provisions of the Acts. All deeds granted by the county council must, in addition to being sealed, be signed by two members of the county council, and by the county clerk (ss. 12, 25).

Powers as to Parliamentary Bills, etc.—A county council has power to oppose Bills in Parliament, with the consent of the Secretary for Scotland, but not to promote any Bill except a Bill for confirming a Provisional Order made under or in pursuance of the provisions of any Act of Parliament (s. 56). Every county council is entitled to be a petitioner, and to appear and oppose any Bill to confirm any Provisional Order under sec. 24 of the Railway and Canal Traffic Act, 1888, and the county council may provide or contribute towards providing the expenses of the appearance or opposition of a petitioner out of the funds or rates under their control (Railway and Canal Traffic Amendment Act, 1891, 54 Viet. c. 12).

Boundaries.—A county council has power to make representation to the Secretary for Scotland as to the alteration of boundaries, or the simplification of areas, etc. (s. 51).

Bye-laws.—The powers of previously existing authorities to make bye-laws are among the powers transferred to the county council. The county council may make suitable bye-laws for the administration of the affairs of the county, for the suppression of vagrancy, and for the prevention and suppression of nuisances, not already punishable in a summary manner by any Act in force (s. 57) (*Eastburn* v. *Wood*, 1892, 19 R. (J. C.) 100). The county council may also appoint suitable penalties for offences against these bye-laws.

Transfer of Powers by Secretary for Scotland.—The Secretary for Scotland, by Provisional Order, may transfer to a county council any of the powers, duties, and liabilities of (1) H. M. Privy Council, the Secretary for Scotland, the Board of Trade, or the Scotch Education Department, or any other Government department, as are conferred by or in pursuance of any Statute, and appear to relate to matters arising within the county, or to be of an administrative character; (2) any powers, duties, and liabilities, arising within the county, of any public body, corporate or uncorporate (not being the corporation of a burgh, or the trustees of a public navigation or lighthouse trust, or the commissioners of police of a police burgh, or a parochial board, or a school board), as are conferred by or in pursuance of any Statute (s. 15).

Relation to Parish Council.—The county council may acquire land for a parish council in certain circumstances (L. G. Act, 1894, s. 25). The county council may lend to a parish council any money which the parish council are authorised to borrow, and for this purpose the county council may borrow (L. G. Act, 1894, s. 28 (4)). Where a parish council desires to have land for allotments, the county council may make an order authorising the parish council to take the land on lease compulsorily (s. 26 (1)). The county council may appoint joint-committees with a parish council (s. 34). See PARISH COUNCIL.

Rights-of-Way, Guide-Posts, etc.—A county council has power to erect guide-posts and direction notices upon any right-of-way (L. G. Act, 1894, s. 42 (4)).

Light Railways Act, 1896, 59 & 60 Viet. c. 48.—The county council may apply to the Commissioners of Light Railways for an order authorising a light railway. The county council may, if authorised by an order from the Commissioners, (*a*) undertake to construct and work, or contract for the construction and working of a light railway; (*b*) advance money by loan or as part of share capital to a company starting a light railway; or (*c*) join

any other county or person or body of persons in starting a light railway (Light Railways Act, 1896, 59 & 60 Vict. c. 48). See LIGHT RAILWAYS.

Rivers Pollution.—The county council have power to enforce the provisions of the Rivers Pollution Prevention Act, 1876, and the subsequent Rivers Pollution Prevention Act of 1893, in relation to any stream passing through or by any part of the county, and they have the powers of a sanitary authority within the meaning of the Act (L. G. Act, 1889, s. 55). See RIVERS POLLUTION.

Creation of Stock.— Where they have statutory borrowing power, a county council may create stock, but to do this they require the confirmation of the Secretary for Scotland. The Secretary for Scotland may issue regulations as to the manner in which the stock may be created, issued, transferred, dealt with, and redeemed (Local Authorities' Loans (Scotland) Act, 1891, 54 & 55 Vict. c. 34, and Local Authorities' Loans (Scotland) Amendment Act, 1893, 56 Vict. c. 8).

Diseases of Animals.—For powers, see CONTAGIOUS DISEASES (ANIMALS) ACTS.

Housing of Working Classes.—For powers, see HOUSING OF WORKING CLASSES.

Wild Birds Protection.—For powers, see BIRDS, PROTECTION OF WILD.

Ranges and Military Lands.—Under the Ranges Act, 1891, 54 & 55 Vict. c. 54, a county council may acquire and hold lands for ranges for volunteer corps. See ARTILLERY AND RIFLE RANGES.

West Highlands, etc. (Scotland) Works Act, 1891, 54 & 55 Vict. c. 58.—Giving certain county councils powers in regard to executing certain works.

Public Health (Scotland) Amendment Act, 1891, 54 & 55 Vict. c. 52.—The county council, on the application of a district committee, may pass a resolution approving of the Public Health (Scotland) Amendment Act, 1891, taking effect in a district. See PUBLIC HEALTH.

Small Holdings Act, 1892, 55 & 56 Vict. c. 31.—The Small Holdings Act, 1892, gives power to a county council to acquire land for small holdings, or to lease it. A "small holding" must exceed an acre and not exceed 50 acres, or, if it does exceed 50 acres, must not be of an annual value exceeding £50 for the purposes of income-tax. See SMALL HOLDINGS.

Allotments (Scotland) Act, 1892, 55 & 56 Vict. c. 54.—Where a county council are of opinion that there is a demand for allotments for the labouring population, and that such allotments cannot be obtained at a reasonable rent and on reasonable conditions by voluntary arrangement between the owners of land and the applicants for the same, the local authority shall, by purchase or leasing, acquire any suitable land and let it in allotments; but not at a price beyond what may be recouped by the rents of the land. See ALLOTMENTS.

Barbed Wire Act, 1893, 56 & 57 Vict. c. 32.—A county council may apply by summary order to have barbed wire on a highway, which is a nuisance, removed.

Shop Hours Act, 1892, 55 & 56 Vict. c. 62.—The county council may appoint an inspector to carry out the provisions of this Act.

County Councils Association (Scotland) Expenses Act, 1894.—A county council may pay out of the general purposes rate any sum not exceeding £30 as a subscription (annual or otherwise) to the funds of a County Councils' Association in Scotland. The expenses of representatives (not exceeding four) to the meetings of the association may be paid.

Fertilisers and Feeding Stuffs Act, 1892.—A county council may appoint, or concur with another council or councils in appointing, an

analyst for the purposes of this Act. See FERTILISERS AND FEEDING STUFFS ACT.

X. ELECTION.

See COUNTY COUNCIL ELECTIONS, PROCEDURE AT.

XI. REGISTRATION.

See REGISTRATION.

[Chisholm and Sherman, *Local Gov. Act*; Mure and Nicolson, *Local Gov. Act*; Black, *Local Gov. Act.*]

County Council Elections, Procedure at.—Subject to certain necessary alterations, the election of county councillors is conducted in the same manner as an election of town councillors in a burgh divided into wards; and the Acts which regulate the election of town councillors apply, subject to the necessary variations (s. 30 (1), Local Government (Scotland) Act, 1889).

The rules of the Ballot Act for conducting municipal elections are made applicable to county council elections by the substitution of the words "county council" for "municipal" or "town council," of "county" for "burgh," of "electoral division" for "ward," of "county clerk" for "town clerk," and of "December" for "November," when used with reference to the date of election, wherever they occur. The regulating Acts are: 3 & 4 Will. IV. c. 76; Municipal Elections (Scotland) Acts (31 & 32 Vict. c. 108; 33 & 34 Vict. c. 92); the Ballot Act (35 & 36 Vict. c. 33), and 48 & 49 Vict. c. 10 (extending the time of poll). The machinery for conducting county council elections, as far as the actual method of election is concerned, being that provided by the Ballot Act, reference must be made to the article on PARLIAMENTARY ELECTIONS, where the Ballot Act and its provisions are fully dealt with. So also, for offences under the Elect. (Scot.) (Corrupt, etc.) Act, 1890, *i.e.* corrupt and illegal practices; illegal payments; employment and hiring—see CORRUPT AND ILLEGAL PRACTICES. For questions relating to petitions and petition procedure, see ELECTION PETITION. In this article it is intended only to deal specially with the provisions of the Local Government Act, 1889.

Councillors.—Any person who is at the time of the election registered as an elector in the county, may be elected for any electoral division of the county, provided he does not hold any office or place of profit under the county council, or any committee of that body, and has no interest, through himself or partner, in any contract with the county council or any of its committees. But "interests" in the following do not disqualify: Leases, sales of land, loans, newspapers, gas, water, insurance, railway, or other company incorporated by Act of Parliament or Royal Charter, or under the Companies Acts, 1862 (s. 9, L. G. A., 1889). An adjudged bankrupt is disqualified from being elected (s. 5, 47 & 48 Vict. c. 16), and women are ineligible (s. 9 (1), L. G. A., 1889) (*Lady Sandhurst*, 1889, 23 Q. B. D. 79; *De Souza*, 1891, 1 Q. B. 687). So also minors, lunatics, and convicts. One councillor only is elected for each electoral division of the county (s. 4 (1), L. G. A., 1889). His term of office lasts for three years; and every third year, dating from December 1892, there is a general election, when all councillors go out of office. They are eligible for re-election (s. 4 (3)).

The Register.—The register is prepared by the assessor every third year, beginning from 1889. It consists of (1) parliamentary register for the year, and (2) a supplementary register containing names of peers, women, and

other persons duly qualified, whose names may not be on the parliamentary county roll (s. 28, L. G. A., 1889). Persons exempted from paying, or failing to pay, consolidated (*i.e.* local rates), or poor rates, are not entitled to vote. The names of those who fail to pay poor rates are not put on the register; but as it may happen that persons on the register may subsequently fail to pay their local rates, the assessor is required to put a distinguishing mark against their names on the register, in order that they shall not be entitled to vote (s. 28 (g)). And so also in the case of persons whose qualifying premises are situated within the boundaries of a burgh, although their names appear on the county parliamentary roll (s. 28 (e)). Objections and appeals against the insertion or omission of the distinguishing mark are competent, and may be made in the same manner as provided for by the Registration Acts (s. 28 (e)). The expense of making up the register falls to be added to the expense of making up the ordinary parliamentary register, and is to be defrayed and provided for as if it were part thereof (s. 28 (5)). See REGISTRATION; FRANCHISE.

The Electoral Divisions of a county are those which in the first instance were fixed by the Secretary for Scotland (s. 5), or those which subsequently have been determined by the Boundary Commissioners to be the electoral divisions of a county. Since the expiry of that Commission, the Secretary for Scotland may, however, on the representation of a county council, alter, by means of a provisional order, the number of councillors, or the number and boundaries of electoral divisions, if a material change has occurred in respect of the population or annual value of the divisions concerned (s. 51 (a) (i), L. G. A., 1889). The Secretary for Scotland may order a local inquiry to be held, prior to issuing a provisional order, and the order when issued shall not have effect until confirmed by Parliament (s. 91 (1–6); s. 93 (1) (2) (3); s. 51, ii. L. G. A. 1889).

Qualification of Electors.—Persons entitled to vote are—

(1) The parliamentary electors for a county, provided they have paid (a) consolidated rates, and (b) poor rates in terms of sec. 28 (1) (a, b, c) L. G. A., 1889:

(2) Peers, possessing the qualification for being registered as parliamentary electors, but subject to the same conditions as above as to payment of rates (s. 28 (h, k)):

(3) Women.—Every woman unmarried, or who, being married, is not living in family with her husband, possessing the necessary parliamentary qualifications. Women are subject to the same conditions as to payment of rates (s. 28 (i)):

(4) Lodgers with parliamentary qualification are entitled to vote, the rent of their lodging being calculated to include rates:

(5) Service franchise occupiers, *i.e.* persons occupying dwelling-houses as part payment of wages, subject to the provisions contained in sec. 29.

(6) County police constables were not entitled to vote in a parliamentary election till 1887 (50 Vict. c. 9). The L. G. A., 1889, did not expressly extend the provisions of 50 Vict. c. 9, to constables as regards county council elections, but all police constables are now entitled, by 56 Vict. c. 6 (1893), to vote at all elections. Burgh police have always been entitled to vote in parliamentary and municipal elections. See FRANCHISE.

Returning Officer.—No provision is made by the L. G. Act for the appointment of a permanent returning officer. The county council have the power to appoint at their meeting in October preceding the election, and they may appoint any one they please—usually the county clerk.

If the returning officer dies, resigns, or becomes disqualified, the Secretary for Scotland may appoint a fit person to act in his room. The returning officer may appoint a fit person as his deputy (s. 30 (2), L. G. A., 1889). The returning officer in county council elections has the same powers as the Sheriff in parliamentary elections. He appoints the presiding officers, who do not require to possess professional status or qualification (s. 30 (2)). He requires, in the event of an election, to provide ballot boxes, etc., and other necessary material: and he is entitled to have the use of those used in parliamentary elections, and which are in the keeping of the Sheriff Clerk, free of charge (s. 14, Ballot Act). So also any room, the expense of maintaining which is paid out of local rates, or by parliamentary grant, may be used by him, free of charge, for the purpose of taking the poll or for counting the votes (s. 6, Ballot Act; s. 30 (5), L. G. A., 1889).

The returning officer may arrange polling districts as he thinks most convenient. He may appoint one or more polling places for each division, or one polling place for two or more divisions, as the case may be; and public notice must be given timeously of such arrangement (s. 31, L. G. A., 1889).

According to the terms of a circular sent out by the Secretary for Scotland at the first county council election, ballot boxes may be sent to and from the returning officer by post.

The returning officer's election expenses, his remuneration, and that of the presiding officers and clerks, are regulated by scale fixed by the county council, and approved of by the Secretary for Scotland (s. 30 (6)). These expenses, so far as not otherwise provided for by law, are paid out of the county fund, and provided for out of the general purposes rate in terms of ss. 26 and 27.

In lieu of security demandable by the returning officer in parliamentary elections, he may in county council elections require the county council to advance him a sum not exceeding £10 for every 1000 electors on the county register (s. 30 (6)).

Taxation.—The Act 49 & 50 Vict. provides for the taxation of returning officer's charges in parliamentary elections, if any claim made by him is objected to. There does not appear to be any such provision as regards municipal elections, and there is no reference to the subject in the L. G. A. of 1889.

Agents.—No express authority is given by the Ballot Act to appoint agents for a candidate at a municipal election, and therefore *nominibus mutandis* at a county council election. If agents are appointed, the provisions of the Ballot Act with regard to them must be carried out. (See Ballot Act, s. 20 (6), Rules 31, 32, 33, 51, 52, 53, 54). See CORRUPT AND ILLEGAL PRACTICES; PARLIAMENTARY ELECTIONS.

Notice of Election must be given by the returning officer not later than 4 P.M. on the third Tuesday preceding the day of election (*i.e.* not later than three weeks before the first Tuesday in December, the day of election), stating: (1) That an election will take place on the first Tuesday in December: (2) that nomination papers may be lodged with the county clerk at any time not later than 4 P.M. of the second Tuesday preceding the day of election (*i.e.* not later than two weeks before the election): and (3) the situation and arrangement of the polling places (s. 30 (4), L. G. A., 1889).

Nomination.—Nomination papers in county council elections require to be signed by two electors only (s. 30 (3)), and may be delivered by anyone to the county clerk. It is necessary only to state the name and abode of the candidate as described in the register. They ought to be prepared and issued by the county clerk. It is not clear that the returning officer

or county clerk has any authority to decide objections to a nomination paper, other than those arising strictly out of the terms of s. 30 (3); as, for instance, that the signatories are less than two, or are not electors, or that the nomination was not lodged in time. A nomination paper, signed by the nominator as "J. S., jun.," when his name was entered on the roll only as J. S., without the "junior," is valid (*Gladhill*, 1889, 23 Q. B. D. 136; *Bowden*, 21 Q. B. D. 309). There does not appear to be any direct power given by the Municipal Elections Act, 1868, to a town clerk to deal with objections to nominations under that Act, the only requirement being compliance with the provisions of sec. 9, and with the form of nomination, "or as near thereto as circumstances admit," in Schedule B of that Act. Sec. 9 of the 1868 Act, so far as it concerns the time and form of the nomination, has been repealed by sec. 4 of the Burgh Police (Scotland) Act, 1892, a new form being substituted by Schedule X of that Act. No mention is made in the Burgh Police Act, 1892, of the town clerk's authority to deal with objections to a nomination. It is stated, however, in Marwick, *Municipal Elections*, p. 47, that there is a discretionary power in the clerk to disregard nominations which depart to any material extent from the requirements of the Statutes, and this of course would apply to the clerk in a county council election. Objections raising the question of qualification of the candidate should not be entertained by the returning officer, or other party appointed to receive nominations (*Worcester*, 1880, 3 O'M. & H. 186; *Queen* v. *Corpor. of Bangor*, 1889, 18 Q. B. D. 349). A nomination paper is not bad because the name of the electoral division has been omitted (*Marton*, 1889, 23 Q. B. D. 139).

Notices and Advertisement.—The clerk must, on or before the day after receiving the nomination, cause public notice to be given of all nominations in the form, as near as circumstances will admit, of Schedule C, Municipal Elect. (Scot.) Act of 1868. Such notices must be affixed to the doors of the town hall or county buildings, and of the parish churches in the county; and the clerk may, if he shall think it expedient, insert it in one or more newspapers published in the county (s. 30 (1), L. G. A., 1889). If there are not more nominations than vacancies, the clerk must intimate there will be no poll (s. 3, 33 & 34 Vict. c. 92), and that the persons nominated will, on the day of election, be declared duly elected. These are all the statutory notices; but it is usual to issue a supplementary notice, stating clearly the particular electoral divisions in which there is a contest, and where a poll is necessary.

Ballot Papers are in the same form as those used at a municipal election, and contain a list of the candidates' names as described in their nomination papers.

One vote only may be given, and no one may vote for more than one candidate (s. 32, L. G. A., 1889). If the voter's name is twice on the roll, and in different divisions, he may not vote in each, but in one only (*Knill*, 1889, 24 Q. B. D. 186, 697).

Polling Day.—Duties of Presiding Officers, etc.—Counting of the Votes.—The method of conducting the election on the polling day, the duties of presiding officers, etc., and the counting of the votes, do not, in a county council election, differ materially from the rules of the Ballot Act relating to parliamentary elections. See PARLIAMENTARY ELECTION. What applies in the one case applies in the other. Declarations of secrecy must be made by the counters and other persons engaged.

Casting Vote.—In the case of equality, the returning officer has not

a casting vote (Ballot Act, s. 20 (7)). A new election takes place upon an order by the Secretary for Scotland, in terms of sec. 36, L. G. A., 1889.

Result of Election.—On the conclusion of the counting of the votes, the returning officer requires forthwith to send to the county clerk a return of the persons elected; and he must also give notice in writing to the persons elected, of their election, along with an intimation of the time and place of the first meeting of the council (s. 30 (7)).

Casual Vacancies, i.e. vacancies caused by death, resignation, non-acceptance of office, or disqualification, are filled up by the county council. The person appointed must be on the electoral roll, and cannot remain in office longer than his predecessor could have done (s. 33, L. G. A., 1889). Casual vacancies among county councillors for burghs are not filled up by the county council, but by the town council (s. 33). In the event of an election being declared on petition to be null, and no person having been declared elected, it is doubtful whether the vacancy would be filled up by the council under the above section (s. 33), or a new election ordered, with consent of the Secretary for Scotland, under sec. 36. This latter section provides that, if a council is not elected at the proper time, or if an insufficient number of councillors is elected, the Secretary for Scotland may, by order, provide for holding a fresh election, or fresh elections, in order to supply any default or insufficiency in the election, at such times and in such names as he may think expedient.

Double Returns.—If a person is returned for more than one division of the county, he must choose which division he shall represent, and intimate his decision in writing to the council, at or before the first meeting after the election. If he omits to do so, the council decides as to which division he shall represent, and the other divisions for which he may have been elected are declared vacant, and a new election is held in the vacant electoral divisions in the ordinary way (s. 34), and without the necessity of applying to the Secretary for Scotland for an order.

Technical Defect.—An election shall not be vitiated by any technical defect (s. 35; see also *Hamilton*, 1875, 2 R. 299). Omission to put name of electoral division on the nomination paper does not affect the validity of the nomination (*Marton*, 1889, 23 Q. B. D. 139; Day's Election Cas. 1892–93, p. 60).

Delivery of Documents to County Clerk.—When the election is over, all the documents relating thereto are given into the keeping of the county clerk, and the provisions as to their custody, inspection, and destruction, relating to parliamentary elections, apply, with the modifications introduced by Rule 64 (a) (b), Ballot Act. The council may order them to be destroyed after a year, if not required by any Court for some legal proceeding or prosecution.

Corrupt and Illegal Practices at county council elections are dealt with by the Elections (Scot.) (Corrupt, etc.) Act, 1890, the provisions of which are applicable to all elections other than parliamentary. See CORRUPT AND ILLEGAL PRACTICES.

Candidates' election expenses and procedure in election petitions are the same in county council as in municipal elections. See MUNICIPAL ELECTION; CORRUPT AND ILLEGAL PRACTICES.

[Chisholm and Shennan, *Handbook of Loc. Govt. Act*, 1889; Nicolson and Mure, *Loc. Govt. Act*, 1889; Rogers on *Elections*; Graham, *Elections (Corrupt Practices Act)*, 1890; Marwick, *Law of Municipal Elections*; Blair, *Election Manual.*] See CORRUPT AND ILLEGAL PRACTICES; MUNICIPAL ELECTION; PARLIAMENTARY ELECTION; ELECTION PETITION.

Court of Chivalry.—This tribunal formed part of the *Aula Regia* established in England by William the Conqueror. The ordinary judges of the Court were the Lord High Constable and the Earl Marshal. Its civil jurisdiction was that of a court of honour, and its criminal jurisdiction in time of war assumed the character of a permanent court-martial; while in time of peace it dealt with the punishment of murder and other civil crimes committed by Englishmen in foreign countries.—[3 Bla. Com. 67; Coke, *Inst.* i. 74 *b*].

Court of Justiciary.—See JUSTICIARY, HIGH COURT OF.

Court of Session.—See SESSION, COURT OF.

Court-Martial—A tribunal for trying offences against military or naval discipline by persons subject to military or naval law.—Military courts-martial are regimental, district, and general. Their constitution and proceedings are regulated by the Army Act, 1881 (44 & 45 Vict. c. 58), the *Rules of Procedure* made in pursuance of that Act, and the Army Annual Act, which brings the former Act into force in each year. A *regimental* court-martial cannot award a heavier punishment than forty-two days' imprisonment. It cannot discharge a soldier with ignominy, nor can it try an officer or warrant officer or a person subject to military law, but not belonging to Her Majesty's forces. A non-commissioned officer above the rank of corporal is not ordinarily to be tried by a regimental court-martial (*Queen's Regulations*, s. vi. par. 5). A *district* court-martial cannot award more than two years' imprisonment; cannot sentence a warrant officer to any punishment except dismissal, or such suspension or reduction as is contained in sec. 182 of the Army Act; and cannot try an officer (s. 48 (6)). A *general* court-martial can alone try an officer and award punishments of penal servitude and death. The legal minimum of members on a regimental or district court-martial is three: on a general court-martial, it is nine in the United Kingdom, India, Malta, and Gibraltar, and five elsewhere. Every member of a regimental court-martial must have held a commission for one year, of a district for two years, and of a general for three years. If the prisoner belongs to the auxiliary forces, one member of the court-martial at least should belong to those forces. All the members of a court-martial must be themselves subject to military law, and must have no personal interest in the case. A regimental court-martial may be convened by a commanding officer (*Rules of Procedure*, 128), if not below the rank of captain, and on board a ship by a commanding officer of any rank, or by an officer authorised to convene a general or district court-martial. A district court-martial may be convened by an officer authorised to convene a general court-martial, or by an officer who has received from such officer a warrant authorising him to convene district courts-martial. A general court-martial may be convened by direct warrant from Her Majesty, or by any officer authorised by Her Majesty to convene such courts, or by an officer holding a warrant to convene such courts from some officer authorised to delegate the power of convening them. Such warrants are usually issued by Her Majesty to the commander-in-chief and to general officers commanding districts.

A field general court-martial has the same powers as a general court-

martial, but is convened without warrant by any officer in command of any detachment or portion of troops beyond the seas, or by the commanding officer of any corps or portion of a corps on active service, or by any officer in immediate command of a body of troops on active service (Army Act, s. 49). Its procedure is more summary (*Rules of Procedure*, 104–122). It must consist of not less than three members, except when three are not available, when it may consist of two; but in that case it cannot give any sentence exceeding imprisonment or summary punishment. A sentence of death must be concurred in by all the members. This special form of court-martial is only to be convened when it is impracticable to try the prisoner by ordinary court-martial, and, when not on active service, only when complaint has been made to the convening officer that an offence has been committed by any person subject to military law under his command against the property or person of any inhabitant of or resident in the country.

The prisoner should have notice of the charge against him, and an opportunity of preparing his defence and communicating with his legal adviser or friend and witnesses. Conviction and sentence by a court-martial is not valid till confirmed by a superior authority. In the case of a regimental court-martial, the confirming authority is the convening officer (Army Act, s. 54 (1) (a)); in the case of a district court-martial, the officer authorised to convene general courts-martial, or deriving authority from such officer (s. 54 (1) (b) (c)); in the case of a general court-martial, Her Majesty, or an officer deriving authority immediately or mediately from Her Majesty.

The regulations with regard to naval courts-martial are contained in 29 & 30 Vict. c. 109, ss. 58–69.

Members of courts-martial are amenable to the jurisdiction of the civil courts in respect of acts done either without jurisdiction or in excess of jurisdiction, but, in the case of persons subject to military law, if the act complained of only affects his military position and character, a court of law will not interfere, and the only appeal lies to Her Majesty (*Mansergh*, 1861, 30 L. J. (N. S.) Q. B. 296; *Dawkins*, 1869, L. R. 5 Q. B. 94; *Dawkins*, 1873, L. R. 8 Q. B. 255, 7 H. L. 744; and cases cited in *Manual of Military Law*, p. 178 *et seq.*).

Persons subject to military law are also liable to be proceeded against under the ordinary law; but if a person sentenced by court-martial is afterwards tried for the same offence by a civil court, that court shall, in awarding punishment, have regard to the military punishment he may already have undergone (Army Act, s. 162).

[*Manual of Military Law* (War Office, 1894); Simmons on *Courts-Martial*; Hickman on *Naval Courts-Martial*; Thring, *Criminal Law of the Navy*; Ersk. B. i. tit. 3. s. 36; Guthrie Smith on *Damages*, p. 78.] See ARMY; JUDGE ADVOCATE-GENERAL.

Courtesy.—This is the right of a surviving husband to a liferent of the heritage in Scotland in which his wife died infeft. As to the history of the right, see Pollock & Maitland, *Hist. of Eng. Law*, ii. 412. It is conditional on there having been a child of the marriage which survived its birth, was heard to cry, and was, for however short a time, its mother's heir. And it does not apply to lands which the wife took by singular succession, except when she was *alioquin successura* (Stair, ii. 6. 19; Fraser, *H. & W.* ii. 1118 *seq.*).

These conditions, arbitrary as they appear, are strictly enforced, and the wife must die infeft (*Clinton*, 1869, 8 M. 370; *Porteous*, 1757, 5 Bro. Supp. 855; *Hamilton*, 1716, Mor. 3117; affd. Robertson's App. 192).

1. If the wife sold her heritage, but died before the purchaser was infeft, it seems the husband's right to courtesy would remain (*Rossborough's Trs.*, 1888, 16 R. 157). And it is not lost if it turn out, after the wife's death, that her title had been incorrectly made up, provided she had the radical right (*Hamilton, ut supra*).

2. The child must have been heard to cry (Stair, ii. 6. 19: Ersk. ii. 9. 53; Fraser, *H. & W.* ii. 1121; *Roberton*, 1833, 11 S. 297; see *Dobie*, 1765, Mor. 6183).

3. The child must be at some time its mother's heir. If the wife is survived by a son of a former marriage, the husband's courtesy is excluded (*Darleith*, 1702, Mor. 3113; Erskine, *l.c.*; Fraser, *l.c.*; Bell, *Com.*, 7th ed., i. 60). If the son of the former marriage predecease the mother, and, possibly, if he survive her but die before his title is made up, so that a son of the last marriage becomes the heir, the right to courtesy arises (Fraser, *l.c.*; see More, *Notes to Stair*, 219, and 37 & 38 Vict. c. 94, s. 9). If the mother is survived by daughters only of both marriages, the husband will have courtesy only of the lands to which his own daughters succeed as heirs-portioners (*ib.*). If a child of the marriage was heard to cry, and was at any time the heir, it is immaterial that it died the moment after its birth (Stair, Erskine, Fraser, *l.c.*; *Stewart*, 1632, Mor. 3112 and 6181). A child legitimated by subsequent marriage, if the heir, would seem to satisfy the condition (Fraser, *l.c.*; Bell, *Prin.* s. 1606; see *Crawfurd*, 1802, Mor. 12698).

4. The wife must not have acquired the property by purchase, donation, or other singular title (*Lawson*, 1709, Mor. 3114; *Hodge*, 1740, Mor. 3119; *Watts*, 1885, 13 R. 218). But it is probably sufficient if she was *alioquin successura*, though her actual infeftment is on a disposition (*Primrose*, Mor. *voce* Courtesy, App. 1; *Knight*, 1786, Mor. 8815; Bell, *Com.*, 7th ed., i. 60; Fraser, *H. & W.* ii. 1123; see *Watts, ut supra*).

Courtesy extends over the wife's heritable bonds (31 & 32 Vict. c. 101, s. 117), and feu-duties (*Clinton*, 1869, 8 M. 370), but not, it would seem, over casualties (Fraser, *l.c.*: Bankt. ii. 6. 20). It vests in the husband *ipso jure* (Stair, ii. 6. 19: Ersk. ii. 9. 52: Fraser, *ib.* 1124). It is thought it extends over lands from which the *jus mariti* and right of administration were excluded, though Fraser expresses a doubt (*H. & W.* ii. 1127; see Walton, *H. & W.* 233).

It is excluded by the alienation of the subjects and the infeftment of the wife's disponee (see *Rossborough, ut supra*), or by real burdens, so far as these extend; by the husband's express renunciation, but not by his acceptance, of a conventional provision (*Primrose*, 1771, Hailes, i. 458; Bell, *Com.*, 7th ed., i. 681).

It is personal to the husband, and rents or fruits not levied by him cannot be demanded by his heir (*M'Aulay*, 1636, Mor. 3112; Ersk. ii. 9. 55; Bell, *Prin.* s. 1608).

The husband enjoying courtesy is liable in the interest of the wife's real and personal debts to the extent of the rents, but has relief against her other property, which may be primarily liable (*Montcith*, 1717, Mor. 3117; Fraser, *ib.* 1126).

If cause be shown for fearing that he will deteriorate the subjects, he may be required to find caution, like other liferenters, under the Acts 1491, c.

25, and 1535, c. 15 (see Ersk. ii. 9. 59; *Ralston*, 1803, Hume's *Decisions*, 293; *Rogers*, 1867, 5 M. 1078).

An alien husband, not naturalised, had formerly no claim to courtesy (More's *Lectures*, i. 74). But as this rested on his incapacity to hold land in fee or liferent, the effect of sec. 2 of the Naturalisation Act, 1870 (33 Vict. c. 14), probably is to remove the disability.

The right to courtesy is lost by the husband's DIVORCE, *q.v.* (*Innerwick*, 1589, Mor. 329), but not by his marrying again (Fraser, *H. & W.* ii. 1127; Craig, ii. 22. 44).

As to the husband's powers, see LIFERENT.

[See Craig, ii. 22. 40; Stair, ii. 6. 19; Ersk. ii. 9. 52; Bell, *Com.*, 7th ed., i. 60; *Prin.* s. 1606; Fraser, *H. & W.* ii. 1118; Walton, *H. & W.* 229.]

Credulity.—See OATH OF CREDULITY.

Crew.—The engagement of crews, the qualification of sailors, their dismissal, wages, complaints, etc., in so far as relating to British ships, are dealt with by the Merchant Shipping Act, 1894, Part II., under the heading "Masters and Seamen" (57 & 58 Vict. c. 60, ss. 92–238). It is here sufficient to consider the crew as that part of the equipment of a ship necessary to render her seaworthy in questions between the shipowner on the one part and charterers or underwriters on the other. It is the duty of the owner to provide a ship "tight, staunch, and strong, well manned, and equipped for the carriage of goods" (Inglis, L. P., in *Steel*, 1877, 4 R. 659, 3 App. Ca. 92). The shipowner is responsible for the negligence of his crew, even when there is an express clause of exemption, where such negligence results in the ship sailing in an unseaworthy condition (*Gilroy & Sons*, 1892, 20 R. (H. L.); 1 App. Ca. 56). Sufficient hands must be kept on board on entering harbour to ensure the vessel against ordinary perils (*The Excelsior*, 1868, L. R. 2 A. & E. 268). As a rule, the crew of a salved ship cannot claim against her as salvors, but exceptional circumstances might let in the claim, as where, after the master had abandoned the ship, the sailors contrived to salve cargo (Abbott, 13th ed., 727). But they are entitled to salvage of other ships, even if belonging to the same owner (*The Sappho*, 1870, L. R. 3 A. & E. 142). The wages of the crew are not subjects of general average except in case of ransom of the ship (Abbott, 658).

See SEAMAN; MASTER; WAGES; PILOT.

Crime—"*An act forbidden by law under pain of punishment*" (Stephen, *General View of the Criminal Law*, p. 1. See also Ersk. *Prin.* tit. iv. 1, p. 631).—The popular idea of crime comprehends something more than this: something not merely involving disobedience to law, but also repugnant to the moral sense. Reflection, however, will show that this element is not essential to crime. There are many gross breaches of morality which are not recognised by law as crimes, and there are many offences of which the criminal law takes cognisance which cannot be said to be in any sense immoral. The moral sense is an elastic quantity, varying in different nations, ages, and even in different periods of the same age. In a society uncivilised, or only semi-civilised, murder, robbery, and theft may be considered subjects for praise rather than blame; and even in a civilised

community, an act which may at one time be considered criminal, may at a later date be only recognised as a breach of morality, *e.g.* adultery, which was at one time a criminal offence. Further, views as to what acts amount to crime vary essentially at different periods of the history of the same country. This applies more especially to offences into which the political element enters. The opinions for which, in 1793, Thomas Muir received sentence of transportation, are now matters of very general acceptance, instead of being subjects for prosecution and punishment. While, however, it is not essential that the moral element should enter into the idea of crime, on the other hand the term "crime" seems hardly applicable to offences partaking more of the nature of a breach of civil right than an offence against the public. Stephen (*General View*, 2, 3), in dealing with his definition of crime, distinguishes between acts involving punishment and those for which a "penalty" is provided. Where, in respect of any breach of the law, a party is liable merely to a penalty, recoverable at the option of some private prosecutor or common informer, he holds that such a breach of the law does not amount to a crime, thus excluding from this term contraventions of the numerous regulations in Municipal and Police Acts. It may be impossible to apply this rule absolutely to the law of Scotland, but, as a general proposition, it seems not an unsuitable limitation of the term "crime," and appears to rest on much the same principles as those recognised in the cases of *Campbell*, 1835, 13 S. 535; *M'Donald*, 1844, 2 Broun, 107; *Somerville*, H. C., 1 June 1844, 2 Broun, 220; *Park*, 1852, J. Shaw, 532. In these cases, which were all instances of statutory contraventions, the question whether the offences were civil or criminal arose with reference to the proper Court of review, and the following elements were referred to as showing that the acts complained of were not criminal: (1) That the acts were not *mala in se*, but *mala prohibita*. (2) That the offences were not prosecuted by or with the concurrence of the public prosecutor. (3) That the prosecution was merely for recovery of penalties.

In Scotland, as in other countries, the law relating to crime is found to consist mainly of what is now known as the common law, or, in other words, the gradual growth of legal ideas and maxims applicable to crime evolved with the progress of society. In addition, there is the Statute law, supplementing, and in some cases modifying, the common law; and further, the High Court of Justiciary possesses the valuable power, independent of statutory enactment, of taking cognisance of fresh phases of crime, even if these have hitherto been unknown to the law of Scotland (Hume, i. 12; Macdonald, 252). (Cases of *Bernard, Greenhuff, and Others*, 1838, 2 Swin. 236; *Will. Fraser*, H. C., 21 June and 12 July 1847, Ark. 280 and 329; and *Chas. Sweenie*, 1858, 3 Irv. 109, and 31 S. J. 24.)

An act to be criminal must be voluntary, and also characterised by the element of Dole.

1. It must be *voluntary*.—If a party is compelled by force to commit a crime, it is not his crime, but the crime of the party who compels him. The compulsion may be either by actual physical force, or by threats of death or serious injury. The amount of compulsion necessary will vary according to the relation of the parties and the circumstances of each case, but it must be such as completely to overpower the will or prevent the possibility of independent action. If it is only sufficient to come under the category of influence, it may be ground for mitigation of, but not for exemption from, punishment (Hume, i. 47–53; Macdonald, 13 and 15).

The question has not yet been raised in Scotland as to whether a person committing a crime while in a state of hypnotic subjection to another, would be free from punishment. If the subject was so completely under the power of the hypnotist as to lose all independent power of will, it is difficult to distinguish such a case from one where physical force is the compelling power; but much would doubtless depend on the circumstances under which the party allowed himself to be hypnotised. The compulsion of want is not recognised by the law of Scotland, except as a ground for mitigation of punishment. Hume (i. 55) is of opinion that the old law of Burdinseek—by which a man (presumably in necessitous circumstances) was not to be punished for the theft of a calf or a ram, or as much meat as he could carry on his back—only meant that the offender should for such a theft not be answerable with his life. The plea of necessity was set up in England in a case where two shipwrecked sailors had, in stress of hunger and in the reasonable belief that it was the only course open to them to preserve their lives, killed and eaten a companion; but the defence was not sustained, and it was held that such an action was, in law, wilful murder (*Dudley*, 1884, L. R. 14 Q. B. D. p. 273). Sentence of death was pronounced in this case, but was afterwards commuted to imprisonment for six months.

2. *The evil state of mind quaintly defined by our old writers as "Dole" must be present.*—(1) The term "dole," corresponding with the English "malice," is an elastic term, and may vary from the most pronounced malice aforethought to merely negligence in the performance of duty. In the latter case the dole is rather of a passive than an active nature,—the want of due attention. Motive must not be confounded with dole. Motive may afford the key to the evil intention, but this intention may originate from a number of motives, or from a motive or motives which it is impossible to discover, and proof of motive is not essential to the conviction of crime in Scotland (Hume, i. 25, 254; Macdonald, 1, 2; Stephen, *General View of the Criminal Law of England*, 70, 71: Harris, *Principles of the Criminal Law of England*, 13, 14). Dole is presumed from the criminal act itself. "A man is presumed to intend the natural consequences of his acts" (Stephen, *General View*, 72). It is not necessary, however, that the results contemplated by the criminal should follow his act. If A. puts poison in a drink for B., and C. drinks it and dies, A. is guilty of murdering C.; or if A. knocks down B. for the purpose of robbing him, and B. dies, A. is guilty of murder.

Although in the general case intention is presumed, yet, where the existence of a particular definite intention is part of the essence of the crime, it must be alleged and proved, as for example, "housebreaking with intent to steal." Intention alone is not criminal, but attempt to commit any indictable crime is now itself an indictable crime (Crim. Proc. Act, 1887, s. 61). Prior to that Act, the law took cognisance of attempts to commit crime only in the case of crimes of a specially serious or flagitious character. Remote preparations, however, would not amount to an attempt. There must be some overt act towards carrying out the evil intention. Ignorance of the law is not a defence to crime, but error in fact may eliminate the element of dole, as where a man takes property in the *bonâ fide* belief that it is his own (References: Hume, i. 21–30; Macdonald, 1, 2; Stephen, *General View*, 71; Harris, *Principles*, 13–15).

(2) *If a party is incapable of Dole, he cannot be guilty of Crime.*—This incapacity may exist from (*a*) *Nonage*; (*b*) *Alienation of Reason.*

(*a*) *Nonage.*—A child under seven is presumed to be incapable of dole, and consequently incapable of crime (Hume, i. 35; Alison, i. 666; Mac-

donald, 10; *Grant*, H. C., 3 June 1889, 2 White, 261). Between the ages of pupilarity and puberty—fourteen in males and twelve in females (Hume, i. 31, seems to fix fourteen as the limit of puberty in case of females as well as of males)—there is responsibility for crime, the element of youth being a circumstance for mitigation of punishment. Hume, i. 33–34, cites numerous cases occurring in the years 1818–27 in which sentences of transportation were imposed on children under fourteen years of age, and even expresses the opinion that a capital sentence might, in aggravated cases, be carried out. But such severe sentences would now be inconsistent with the spirit of the age. The tendency now, as regards juvenile offenders, is to avoid even sentences of imprisonment, and to take advantage of the Acts which have been passed with a view to the reformation rather than the punishment of such offenders, namely, the Industrial Schools Acts, 1866 and 1880 (29 & 30 Vict. c. 118, and 43 & 44 Vict. c. 15); the Reformatory Schools Acts, 1866 and 1893 (29 & 30 Vict. c. 117, and 56 & 57 Vict. c. 48). The Probation of First Offenders Act, 1887 (50 & 51 Vict. c. 25), provides a suitable method of dealing with many cases, and in the case of juvenile male offenders the provisions of the Acts 23 & 24 Vict. c. 105, s. 74, and 25 & 26 Vict. c. 18, substituting corporal punishment for imprisonment, are frequently followed.

(*b*) *Alienation of Reason* through insanity or idiocy at the time when a crime is committed, exempts from punishment; but it must be such that the person does not know "the nature or the quality of the act" he is doing, or, "if he does know it, that he does not know he is doing what is wrong" (Hume, i. 37; Alison, i. 645, 646; Macdonald, 11; *Alexander Robertson*, 1891, 3 White, 6).

Weakness of Mind insufficient to infer irresponsibility may justify conviction for a minor crime than that with which the accused is charged, *e.g.* culpable homicide instead of murder, or may lead to mitigation of sentence or reprieve from capital punishment (Macdonald, 15, 16; case of *Fergusson*, 1894, 1 Adam, 517).

Intoxication at the time of the commission of crime is not a defence, but may be taken into consideration in deciding whether the act was attended with full malicious intent, or only with culpable recklessness in a minor degree; and in certain circumstances it may justify a verdict of culpable homicide instead of murder (Macdonald, 16; *Margaret Robertson or Brown*, H. C., 15 Mar. 1886, 1 White, 93; *John M'Donald*, Ayr, 11 Aug. 1890, 2 White, 517; *David Kane*, H. C., 12 Dec. 1892, 3 White, 386).

An act committed while a person is asleep is not criminal (*Simon Fraser*, H. C., 15 July 1878, 4 Coup. 70).

Crimen falsi.—Mackenzie defines the crime of falsehood (*Crim. Tr.* Part I. tit. 27, pr.) as "a fraudulent imitation or suppression of truth, to the prejudice of another." Hume and Erskine regard *crimen falsi*, or falsehood, as a generic term, under which may be ranged various species of crime, of which falsehood—spoken, written, or acted—is the predominant characteristic. In this sense the term *crimen falsi* would include: (1) *Fraud and cheating*. (2) *Falsehood by writ*, which includes (*a*) forgery; (*b*) falsehood by fabricating writings, where the crime does not come up to forgery. (3) *Possession of bank note or stamp forgeries or instruments*. (4) *Vending forged bank notes*. (5) *Falsehood in registering births, marriages, and deaths*. (6) *Bankruptcy frauds*. (7) *Coining*. See COINING.

In the sense of the definition of *crimen falsi* given by Mackenzie, the

crime seems to be restricted to that of spoken falsehood. According to the definition, the crime is complete when these two elements are present: (1) Either a "fraudulent imitation" of the truth, that is, a direct falsehood, or a *suppressio veri*, where there is a duty to speak, combined with (2) prejudice resulting to another. Falsehoods used by beggars to obtain money, and the falsehoods of fortune-tellers and card-sharpers, are examples of the offence (*Clark & Others*, 1859, 3 Irv. 409). A common case, also, is that of apprentices and men who are diseased obtaining the enlistment bounty by stating falsely that they are not apprentices, and, in the latter case, that they are sound (Hume, i. 174; Alison, i. 364). False representations made to obtain goods must, in order to be criminal, have reference to past or present, and not solely to future time (*Hall*, 1881, 4 Coup. 438). As an example of *crimen falsi* by a *suppressio veri* may be taken the case of a sham article being purchased as genuine, the seller knowing that the article is not genuine, and saying nothing to remove the erroneous impression as to its genuineness which the intending purchaser has formed (*Bannatyne*, 1847, Ark. 361; *Paton*, 1858, 3 Irv. 208. See also Ersk. iv. 4. 66).

Crimen repetundarum.—The first regular criminal Court at Rome was established by the lex Calpurnia, B.C. 149, to try claims by provincials for the recovery of money or property extorted by a governor-general or other magistrate (hence called *pecuniæ repetundæ*); reparation was to be made according to a fixed pecuniary scale. Of the later Statutes, which extended the definition of the crime, and introduced other penalties for it, the most important is the lex Julia of B.C. 59; it is commented on in the following titles: *Digest*, 48. 11, and *Code*, 9. 27. Any official was liable to prosecution under this charge, not only for actual bribery or oppression,—that is, for improperly taking money to influence him in his judicial or administrative functions, or for exceeding them,—but even for a contravention of the rules laid down by Statute for securing the purity of the Civil Service, such as the prohibition against holding land in his province, or contracting a marriage with a provincial lady.

Criminal Conversation—A term of English law.—An action for criminal conversation, or, as it was invariably called, "crim. con.," was an action by a husband for damages against the seducer of his wife. Before the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which established the Divorce Court in England, divorce could only be obtained in that country by a private Act of Parliament. The husband was obliged, under the Standing Orders of the two Houses, to prove to the committee that he had brought an action for "crim. con." and obtained a judgment, or to show a sufficient reason why such an action had not been brought. The action was abolished in England by 20 & 21 Vict. c. 85, s. 59.

Criminal Law Amendment Act, 1885.—*Procuration, Drugging, etc.*—This Act (48 & 49 Vict. c. 69) makes it an offence punishable by two years' imprisonment:

A. Sec. 2. To procure or attempt to procure (1) a female under 21 years of age, not being a prostitute or of known criminal character, to have unlawful intercourse with any person anywhere; (2) any female to become a common prostitute; (3 and 4) any female to leave the United Kingdom,

or to leave her usual place of abode in the United Kingdom, in order to become the inmate of a brothel:

B. Sec. 3. (1) By threats or intimidation to procure or attempt to procure any female to have unlawful connexion; (2) by false pretences or false representations to procure any female, other than a prostitute or a person of known criminal character, to have unlawful connexion; (3) administer to any female any drug, matter, or thing with intent to stupefy or overpower, so as thereby to enable any person to have unlawful connexion with such female.

With reference to these three last, all three are crimes by the common law of Scotland under certain circumstances. To obtain connexion by threats of murder, or by pretence of performing a surgical operation, or by drugging, is rape. Whether something far short of these—as, for example, a threat to expose misconduct with another person, or a pretence by a married man of being a single man with intention of marriage, or the giving of drink to excite and confuse without making the victim dead drunk—is a crime under the Statute, is a doubtful question.

Offences against Children.—By the common law of Scotland the age of consent is twelve. To have intercourse with a girl under that age is rape. Sec. 4 of the Act, without using the word rape, provides the same punishment as for rape when the girl is under thirteen. On the other hand, an attempt to have carnal knowledge of a girl under thirteen is punishable under the Statute by a term not exceeding two years, whereas by the common law such an attempt on a girl under twelve may be punished with penal servitude.

Juvenile offenders under this section may be whipped and sent to a reformatory.

To have connexion with a married woman by personating her husband is declared to be rape. This, too, is a crime by the common law of Scotland.

Age of Consent.—The most important change in the law effected by the Act is that contained in sec. 5. Under this section it is declared to be a crime punishable by imprisonment not exceeding two years to have carnal connexion with any girl between the ages of thirteen and sixteen. Prosecutions under this part of the section must be commenced within three months of the commission of the offence. Repeated acts are not regarded as making the offence a *crimen continuum*, so as to make relevant a charge extending over a period of time reaching beyond the three months (*Philp*, 1890, 2 White, 525). It is a sufficient defence if it shall be made to appear to the Court or jury that the accused had reasonable cause to believe that the girl was of or above the age of sixteen years. It is thought that the provision with reference to the "Court" is meant to suit the case of summary trial without a jury. The question what is reasonable cause is one for the jury. It is not enough that the girl looks as if she might be over sixteen (*Hoggan*, 1893, 1 Adam, 1). The girl is not liable to prosecution as an accessory to the offence (*Tyrrell*, 1894, 1 Q. B. 710).

Imbeciles.—Under this section a like penalty is provided against unlawful connexion with any female idiot or imbecile under circumstances which do not amount to actual rape, but which prove that the offender knew at the time of the commission of the offence that the woman was an idiot or imbecile.

Premises.—The Act next (s. 6) provides the same penalties, in the case of girls under thirteen and sixteen respectively, as are imposed for the offence of having connexion with them, upon any person who induces or allows the girl to resort to his or her premises for the purpose of such unlawful

connexion. It was held that the offence was committed although the girl was the daughter of the accused, and the premises the girl's home, where she resided with the accused (*Webster*, 1885, 16 Q. B. D. 134).

Abduction.—Any person who, without any reasonable cause to believe that the girl is of or above the age of eighteen, takes a girl under eighteen out of the custody of her father or mother, or any other person having the lawful care or charge of her, for the purpose of unlawful connexion, is (s. 7) made liable to two years' imprisonment.

Unlawful Detention.—A like penalty is imposed (s. 8) upon any person who detains a girl against her will upon any premises for the purpose of unlawful connexion, or in any brothel. Such detention is to be inferred from the withholding from the girl of clothes with which to leave, or threatening her with legal proceedings if she takes away clothes with which she has been supplied. No legal proceedings, civil or criminal, are to be taken against any woman for taking away such apparel as was necessary to enable her to leave a brothel.

Search.—A power is (s. 10) conferred upon magistrates of granting a search-warrant where there is reasonable cause to suspect that a woman or girl is being unlawfully detained for immoral purposes.

Indecency between Males.—Acts of gross indecency between males, or procuration for that purpose, are (s. 11) made punishable by imprisonment for a period not exceeding two years. This is an offence by the common law of Scotland. The statutory charge may be tried summarily (*Clark*, 1886, 1 White, 191).

Custody.—The Court are authorised (s. 12) to remove any girl under sixteen, against whom an offence under the Act has been committed with the connivance of her natural or legal guardian, from the custody of such guardian, and to place her under other guardianship until she shall attain the age of twenty-one.

Suppression of Brothels.—Penalties not exceeding twenty pounds or three months for a first offence, forty pounds or four months for a second offence, and the like, plus caution for twelve months or three months more, are imposed (s. 13) upon any person who keeps, manages, or assists in managing a brothel, or permits premises of which she has the control, as lessee or otherwise, or lets premises of which she is owner, to be used as a brothel. A house where one woman receives men for the purpose of prostitution is not a brothel within the meaning of the section (*Singleton*, 1895, 1 Q. B. D. 607).

Miscellaneous Provisions.—Amongst the ancillary provisions which may be noticed, are a saving of the common law (s. 16), power to the Court to award costs, the application of which to Scotland is not clear (s. 18), and the making of accused persons competent, but not compellable, witnesses (s. 20). Although it is competent to convict of a statutory charge under an indictment for rape (s. 9), this does not render the accused a competent witness in a trial for rape (*Henderson*, 1888, 2 White, 157), on the ground, as explained by the Court, that the Statute must be libelled in order to warrant a conviction under it, a ruling which seems to render nugatory, so far as concerns Scotland, the provision sanctioning the alternative verdict.

Criminal Letters.—Criminal letters and indictments constitute the two main steps or forms of process by means of which those charged with crimes are arraigned before the High Court of Justiciary. They are essentially different in their characteristics. Indictments—which

directly charge the accused with the crime libelled—can be used only by one invested by the sovereign with the authority of public prosecutor while acting in that capacity. Criminal letters are, and have been, the only form which could be used by a private prosecutor, though this form was also largely used by the public prosecutor, and in certain circumstances after mentioned was the only form competent even to that official.

Application for criminal letters—which pass under the signet of the High Court of Justiciary—is made by a bill for criminal letters, upon which the Clerk of Justiciary grants a deliverance to a certain day in the form: "*Fiat ut petitur* the person complained upon to the day of next ilk assizer and witness under the pain of 100 merks Scots." Prior to 1848 the *fiat* was granted by one of the judges. The *fiat* serves as the prosecutor's warrant for raising criminal letters and having them passed under the signet of the Court. They begin with an address in the sovereign's name to macers, messengers-at-arms, etc. They proceed, in syllogistic form, to set forth the crime, charge, etc., and conclude with the sovereign's will for summoning accused, witnesses, and assizers.

Originally, crimes concerning individuals were prosecuted by the party injured. The first mention of the Lord Advocate's power to prosecute alone is contained in the Statute 1587, c. 77. While the concourse of the Lord Advocate to prosecutions at private instance seems generally to have been required, yet, in the early periods of our law, private parties might pursue crimes without such concourse.

The bill for criminal letters, where the prosecution was at the instance of the Lord Advocate, was signed by him. In prosecutions by private parties, by the party prosecuting, and, where necessary, the Lord Advocate subjoined his concourse to the bottom of the bill.

Criminal letters were generally used by the Lord Advocate against accused persons who were at large, as, under the letters, they were charged to come within so many days and find caution to appear at the diet named. The same form of charge, however, was used although the person accused were in custody.

Where, under the Act of 1701, an accused person in custody was *running his letters*, and was charged by the Lord Advocate *under new* criminal letters, these were, under the Statute, the only form competent.

In public prosecutions before the High Court of Justiciary, wherein the Lord Advocate was not constrained by the Act of 1701, criminal letters were gradually superseded by indictments, and the Act 9 Geo. IV. c. 29, s. 5, enacted that all crimes might be tried in any Circuit Court of Justiciary by indictment in the same manner as before the High Court of Justiciary at Edinburgh. Prior to the passing of this Act, the practice had been that all libels drawn after 22nd February and 22nd July, for the spring and autumn circuit respectively, were in the form of criminal letters.

By the Act of Adjournal of 17th March 1827, it was provided, in regard to the form of process in criminal cases to be observed in the Sheriff Court and in the Courts of the royal burghs of Scotland, that the libel should be drawn as nearly as possible in the form of criminal letters.

By sec. 2 of the Criminal Procedure (Scotland) Act, 1887, public prosecutions in the form of criminal letters are abolished; and it is declared that all prosecutions for the public interest before the High Court of Justiciary, and before the Sheriff Court, where the Sheriff is sitting with a jury, shall proceed on indictment in name of Her Majesty's Advocate, and that part of the Act of 1701 compelling the public prosecutor to use the form of criminal letters in the circumstances above mentioned is repealed (s. 43).

Prosecutions before the High Court of Justiciary at the instance of private parties continue to be competent, and the only competent form is, as formerly, by criminal letters. The first formal step in this process is the lodging of the bill for criminal letters with the Clerk of Justiciary, in order to its being laid before the Court. If the bill do not bear to have the concourse of the Lord Advocate, and his concurrence does not appear to have been asked, the Court will not consider the bill. If the Lord Advocate's concurrence has been refused, the Court may, on consideration of the circumstances, either order the Lord Advocate to grant it or allow the complainer to proceed without his concourse (*Mackintosh*, 1872, 2 Coup. 236 and 367; *Alex. Robertson*, 28 Oct. 1887, 1 White, 468). There has been no application for criminal letters by a private party since the above case of *Robertson*.

Criminal Prosecution.

I. Solemn.

Trifling offences are tried before the Sheriff or the magistrates *summarily*. By contrast with this, the more deliberate method of procedure adopted for the trial of grave offences is described as "solemn." The system which has long prevailed in Scotland is that of public prosecution. Private prosecution for crime is competent, but only with the concurrence of the Lord Advocate: and this mode of procedure is virtually obsolete. The enforcement of the criminal law is in the hands of the Lord Advocate, whose powers in this relation are of a very wide and comprehensive character. In this department of his office, the Lord Advocate exercises directly the executive authority of the sovereign, and he is not answerable to, or bound to take instructions from, any other minister of the Crown. In the discharge of the duties of public prosecutor, the Lord Advocate is assisted by the Solicitor-General and four Advocates-Depute (see Advocates-Depute), whilst in each County or Sheriff Court district he is represented by the Procurator-Fiscal (see Procurator-Fiscal).

Criminal Procedure (Scotland) Act, 1887.—Criminal Procedure is now very largely regulated by the Criminal Procedure Act of 1887. It is beyond the scope of this article to give an account of the practice formerly prevailing, which in many particulars was highly technical. As the text of the Act of 1887 is readily accessible to all practitioners, it has been deemed unnecessary, whilst giving an account of its leading provisions, to attempt to paraphrase the Act. The procedure in trials for treason or rebellion are not governed by this Act (see Treason).

Declaration and Commitment.—Immediately upon the apprehension (see Apprehension) of any person charged with serious crime, he is brought before the Sheriff, in order that he may emit a declaration with reference to the charge. It is optional on the part of the accused person to make a declaration or not, and he is entitled to consult a law agent before being brought up to make his declaration (see Declaration). The accused, after emitting his declaration, is generally committed to prison "for further examination." The inquiry is then completed, and on the precognition being laid before the Sheriff, if satisfied that there is a *primâ facie* case, he commits the accused to prison "until liberated in due course of law."

Bail.—Application for liberation on bail may be made at any stage, and falls to be disposed of by the Sheriff, subject to appeal to the High Court of Justiciary (see Bail).

Report to Crown Office.—When the precognition has been completed, the Procurator-Fiscal reports it to the Crown agent at Edinburgh, in order that the instructions of Crown counsel may be taken as to the disposal of the case. If Crown counsel, who are vested with the authority of the Lord Advocate, order liberation, the accused person is at once set at liberty. If, on the other hand, the case is to go to trial, an order is made by Crown counsel as to the mode in which it shall be tried. If the case appears to Crown counsel not to be a serious one, it may be ordered to be tried summarily before the Sheriff; but if it appears to be of too grave a nature to be so disposed of, an order is pronounced for trial either before the Court of Justiciary or before the Sheriff and a jury. A third form of procedure, which is still competent though very rarely resorted to, is to try the accused "solemnly" before the Sheriff without a jury (see Moncreiff on *Review*, ch. i).

Acceleration of Trial.—Formerly a prisoner who desired to accelerate his trial had to adopt a somewhat cumbrous process, which was called "running his letters." Now the matter is regulated by the Criminal Procedure (Scotland) Act, 1887. There are two provisions by availing himself of which an accused person may accelerate his trial. Under sec. 31 he may give notice to the Crown agent that he intends to plead guilty, and in this case an indictment is served upon him on an *inducie* of not less than four clear days. On this indictment he is brought before the Sheriff, who either sentences him, or if the case be one appropriate only to the High Court, or in his opinion too serious for disposal by the Sheriff, remits him to the High Court for sentence.

Again, under sec. 43 an accused person who has been sixty days in prison subsequent to the warrant committing him until liberated in due course of law, may give notice to the prosecutor requiring him to serve an indictment within fourteen days; and "upon a note being presented to the High Court of Justiciary setting forth that such notice has been given, and that no indictment has been served within such fourteen days, the Court shall appoint the prosecutor forthwith to show cause: and where cause is not shown to the satisfaction of the Court, the Court shall grant warrant ordering such person to be released at the expiry of three days from the issuing of such order, unless within said three days an indictment be served upon him." By the same section it is further provided that all imprisoned accused persons shall be brought to trial, and the trial concluded within one hundred and ten days from the warrant of commitment until liberated in due course of law. But the Court of Justiciary has power to extend the time upon special cause shown.

Case Ordered to be Tried by Sheriff and Jury.—Where a case is ordered to be tried by Sheriff and jury, the conduct of the prosecution is in the hands of the local procurator-fiscal, and the trial of the accused takes place within the jurisdiction in which the offence charged, or part of it, or one or more of the several offences charged, was committed.

Indictment.—The indictment proceeds in the name of the Lord Advocate. The form of the indictment is statutory (Criminal Procedure Act, 1887, s. 2 and Schedule A). The essential particulars required are: the crime charged, and the place where and the time when the alleged crime was committed. There are various provisions in the Criminal Procedure Act of 1887 whereby certain details which it was formerly the practice to set forth in the indictment are to be held as implied,—as, for example, the words "actor or art and part," or "falsely and fraudulently." Reference is made to secs. 4 to 15 of the Act for further particulars as to the forms to be adopted in

framing criminal indictments, and the latitude or generality to be allowed in certain respects. Where the accused is charged with any completed crime, he may be convicted of an attempt to commit it, or, in the case of personal violence, of an offence of a less heinous denomination than that charged (Criminal Procedure Act, 1887, s. 61). Where the crimes charged are cumulative, he may be convicted of any one of them, and, in any case, of any separable part of what is charged, being itself a criminal offence (s. 60). The indictment may be amended at any time prior to the closing of the case for the prosecution, provided that the amendment be not material to the merits, and the Court be satisfied that the accused will not be prejudiced (s. 70). An accessory before the fact is equally guilty with the principal, and it is not necessary to charge him separately, the words "as principal or accessory" being read into every indictment. A list of documents or other articles to be produced at the trial, and a list of the witnesses to be examined, are appended to the indictment. The whole is served upon the accused. The productions are placed in the hands of the Sheriff Clerk, where they are open to inspection by the accused (s. 37). A list of jurors to be cited is also prepared by the Sheriff Clerk, and this list is open to the inspection of the accused, or his agent (s. 38).

First Diet.—The first diet takes place at the Sheriff Court nearest to the prison in which the accused is incarcerated, or, if he is on bail, the Sheriff Court of the district of the domicile given for citation in the bail bond, or, in any other case, before the Sheriff in whose jurisdiction the crime is said to have been in whole or in part committed (Criminal Procedure Act, 1887, s. 26). At this diet the prisoner is called upon to plead guilty or not guilty to the offence with which he is charged.

Plea in Bar.—This is the proper stage at which to take any plea in bar of trial. Such a plea may be PUPILARITY (see), INSANITY (see this article for an account of the procedure in case of insanity, either at the date of trial or at the date when the offence was committed), PRESCRIPTION (see), which, in the case of crime, seems to be a discretionary plea (Macdonald, 279), *tholed an assize* (see RES JUDICATA, and *infra*, p. 385), no *jurisdiction* (see JURISDICTION), or promise of indemnity by Crown (see QUEEN'S EVIDENCE; and Macdonald, 433).

Relevancy.—This, too, is the proper stage, namely, before the accused has pled to the libel, to take any objection which there may be to state to the relevancy of the indictment. Since the passing of the Criminal Procedure Act of 1887, such objections have become infrequent, and they are now rarely successful. If the objection be sustained, the prosecutor may move for leave to desert the diet *pro loco et tempore*, and the accused may be subsequently tried on a new indictment, the original warrant of commitment to prison still holding. On the other hand, if the prosecutor desert the diet *simpliciter*, the accused cannot be tried again for the same offence (Macdonald, 442). The prosecutor cannot desert the diet after the jury is sworn (*ib.*).

Plea.—If the accused plead guilty in a Sheriff Court case, sentence is forthwith passed upon him; but if not guilty, then the case is adjourned to the second diet, when the accused is tried before the Sheriff and a jury within the jurisdiction of the offence, as above explained. If the accused offer a modified plea, the prosecutor may or may not accept it.

JUSTICIARY COURT CASES.—The procedure preliminary to trial follows the same order when the trial is to take place before the High Court of Justiciary, with the following differences:—The immediate conduct of the prosecution is in the hands of Crown counsel. At the first diet the

Sheriff does not himself dispose of any objection to the relevancy which appears to him not to be frivolous, but reserves the same for the consideration of the High Court, without requiring the accused to plead to the libel (Criminal Procedure Act, 1887, s. 29). If the panel pleads guilty at the first diet, the plea is simply recorded, and sentence is postponed until the second diet. In regard to the second diet, the Lord Advocate possesses the power to change the venue. Any case may be brought to Edinburgh for trial, or taken to any place within the limit of the circuit; or if no Court be soon to be held within the circuit district, then to any place in an adjacent circuit district (Criminal Procedure Act, s. 51).

The rules and arrangements with reference to the holding of Circuit Courts will be found explained under the article CIRCUIT COURT.

Procedure at Trial.—At the trial itself the order of proceedings is the same, whether the case be before the Sheriff and a jury, or before the High Court. In the High Court of Justiciary, in difficult and important cases, three judges sometimes occupy the Bench, as in a trial at Bar in England. The Court has power to adjourn a trial on the motion of either party, but the adjournment must be to a fixed date (Macdonald, 440). The rules and practice with reference to juries, the summoning of the jury, the number of jurors, special and common jurors, challenges, the balloting and swearing of the jury, the custody and enclosure of the jury during the trial, outside communication with jurors, illness or misconduct of a juror, etc., will be found detailed and explained in the article JURY.

The order of procedure at a criminal trial with a jury is as follows:—"The diet is called" by the clerk, a technical term which signifies the bringing of the case under the judicial cognisance of the Court, the accused being present. If it should happen, however, that the accused, not being in custody, should not appear, then, if the case be a High Court one, sentence of fugitation or outlawry is passed (see FUGITATION). This sentence cannot be pronounced in a Sheriff Court case. After the diet is called in a High Court case, counsel for the panel may make any objection to the relevancy of the indictment, or state any plea in bar of trial which was taken at the first diet and has been reserved for the consideration of the Court. If no objection be taken, or if the objection be repelled, the Clerk of Court states what was the prisoner's plea at the first diet; and at this stage, or indeed at any stage of the case, the prisoner may, if he please, withdraw his plea of not guilty. At this stage, too, if there be more than one accused, a motion may be made for separation of trial, which, however, is very rarely granted. If the plea of not guilty be not withdrawn, the next step is the balloting of the jury. When the jury have been sworn, the nature of the charge is explained to them. It is not now usual to hand them copies of the indictment; but if there be several prisoners, or the charges be numerous or intricate, and there be no previous convictions charged, then the jury may be furnished with copies of the indictment. It is not competent, however, to bring under the cognisance of the jury in any form the fact that the accused has been previously convicted, unless the accused leads evidence of his good character, or the case be one of those in which, as under certain circumstances in reset, the previous conviction is itself competent evidence *in causa* (Criminal Procedure Act, 1887, s. 67). A previous conviction libelled in the charge is presumed to be admitted unless the accused gives timeous notice to the prosecutor that he means to impugn it, in which case it may be inquired into by parole evidence after verdict or plea (*ib.* s. 66). A previous conviction of any cognate offence may be charged as an aggravation (ss. 63–65).

The evidence for the prosecution is next adduced. The prosecutor may examine any of the witnesses, and proceed to lay before the jury any of the productions in his lists, and he may have the accused's declaration read, but he cannot examine any other witnesses or make any new production. The accused is not a competent witness, except in certain cases where this is allowed by Statute; nor is the spouse of an accused person, unless the alleged crime be an assault upon that spouse. The rules of evidence in criminal trials, however, will be found in the article upon EVIDENCE, and reference is made to that article and to the article WITNESS for further information with reference to the admissibility of witnesses.

When the evidence for the prosecution is closed, the prisoner has an opportunity of leading evidence in his own defence. The only limits upon this right are as follows:—Notice of any special defence, such as ALIBI or SELF-DEFENCE, must be given to the prosecutor at the first diet, or, if a special reason be shown to the satisfaction of the Court for not having given it then, it must be given within two clear days before the second diet. A list of witnesses and productions for the defence other than those in the prosecutor's list must be given to the prosecutor at least three clear days before the trial, unless some good cause be shown for failure, in which case the Court may order the adjournment or postponement of the trial, so that the prosecutor may not be prejudiced by the want of notice (Criminal Procedure Act, 1887, s. 36).

The prosecutor is not allowed any proof in replication. This is a defect in our system of procedure. The prosecutor's list of witnesses is closed long before he receives notice of a special defence or any list of the defender's witnesses. The defence may be a complete concoction, and the prosecutor may possess ample evidence to prove this, yet he is not allowed to do so, unless it happens that the witnesses who can expose it are in his own list, and he is able to anticipate it when examining them.

When the evidence, if any, for the accused has been adduced, the counsel for the parties may address the jury, the prosecutor speaking first, and not having, as in England, any right of reply.

Verdict.—Thereafter the judge sums up, and the jury, after retiring, or without retiring, return their verdict, which may be either unanimous or by a majority. The jury may return a *Special Verdict* (see VERDICT), but this is rarely done, and in practice the verdict is almost invariably one of three—"Guilty," "Not Proven," or "Not Guilty." Both the latter are verdicts of acquittal; and if either be returned, the panel is assoilzied and dismissed from the bar. It is beyond the province of this article to discuss the propriety of the practice (the origin of which is accidental), which allows alternative verdicts of acquittal. It may be pointed out, however, that on the one hand it is urged that it is unfair to leave a slur upon a man who is not proved to be guilty, as is done by the verdict of "Not Proven." On the other hand, the verdict is defended as favourable to the accused, some jurors being willing to take this middle course who would hesitate to return a verdict of not guilty; and further, under our system "Not Guilty" means *not guilty*, and the possibility of a less favourable verdict enables a really innocent man to obtain a verdict which clears him of suspicion.

Sentence.—If the verdict be one of guilty, sentence follows on the motion of the prosecutor. The prosecutor must move for it, and it is in his absolute discretion to do so or not. If he refrain, the Court have no power to pass sentence on their own initiative, and the panel is dismissed from the bar. Apart from this, the only possible interposition between verdict and sentence is a *motion in arrest of judgment*—a rare but competent

proceeding. The grounds of such a motion may be some irregularity or misconduct on the part of the jury, such as dispersing during an adjournment, not discovered by the accused until after the verdict, or some inconsequence in the verdict, or defect of jurisdiction in the Court, or the state, mental or physical, of the accused (Macdonald, 512). The sentence is discretionary, subject to these qualifications: (1) In the Sheriff Court the limit is two years' imprisonment. (2) The power of the Court to inflict any sentence (not being the case of a juvenile offender) other than caution, fine, imprisonment with or without hard labour or solitary confinement, penal servitude, police supervision, or death, is probably obsolete. (3) For murder, the death sentence must be pronounced; also for certain offences against the Act 10 Geo. IV. c. 38, unless the prosecutor restrict the pains of law, but for no other offence is this sentence now competent except for treason (Criminal Procedure Act, 1887, ss. 56, 75). (4) In the case of certain statutory offences, the Statute contains directions as to the punishment to be inflicted. (5) Constant practice forbids the infliction of any sentence short of penal servitude for a completed rape committed by a person of full age and full mental capacity. Imprisonment is never inflicted for a longer period than two years, and penal servitude cannot be imposed for a period of less than three years.

Sentence in the High Court of Justiciary is final. There is no form of review. This rule applies to all the procedure of the Court, to interlocutory judgments, as well as to sentences. The judge, however, who is trying a case, if any point of novelty or difficulty should arise, may "certify" the case for the consideration and decision of the High Court of Justiciary, in which Court it is generally heard before either three or seven judges, according to its importance or delicacy. Such certification has the effect of staying further procedure. A judge cannot, as in England, proceed with the trial, reserving a point for the opinion of the Court. When the trial has been before the Sheriff and jury, there is no appeal; but if a conviction has followed, the sentence may be reviewed before the High Court of Justiciary in a process of suspension and liberation. In such a process it is not competent to examine the evidence or review the findings of the jury on the facts. On that matter the jury are final. Nor is alleged error of law in the judge's charge a valid plea for suspension of the sentence. The grounds of review are: (1) irrelevancy of the indictment; (2) oppression; (3) irregularity of procedure. See SUSPENSION AND LIBERATION.

It is a fundamental principle of the criminal law of Scotland that an accused person cannot be tried again upon a charge on which he has already been tried, or upon another charge based upon the same facts. He has "*tholed an assize.*" Two qualifications have been recognised to this rule. Where what was thought to be a trifling assault leads to fatal result, it does not bar a charge of murder or of culpable homicide that the accused was tried summarily for the assault. Again, where a trial breaks down or miscarries by misadventure for which the prosecutor is not responsible,—for example, by the illness of a juryman or of the accused,—the plea will not be sustained (Macdonald, 432–3).

[Hume, *Commentaries*; Alison, *Criminal Law*; Macdonald, *Criminal Law*; Macdonald, *Criminal Procedure Act Handbook*; Monereiff on *Review.*]

II. SUMMARY.

The full signification of the term "summary jurisdiction" cannot be expressed in a definition. It may be said to mean, however, in Scottish

practice, that species of jurisdiction in which proceedings for the trial of an offence, or recovery of a penalty, are instituted by way of complaint in an inferior Court, and tried without the aid of a jury. The provisions of the Summary Jurisdiction (Scotland) Acts, 1864 and 1881 (27 & 28 Vict. c. 53, and 44 & 45 Vict. c. 33), and the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35), ss. 4 to 15, 58 to 71, and Schedule A, are applicable to all such proceedings; but it is in the option of the prosecutor in complaints under the Tweed Fisheries Acts, and in police prosecutions under general or local Police Acts, to use either the forms prescribed by those special Acts, or the forms provided by the Summary Jurisdiction Acts (44 & 45 Vict. c. 33, s. 3). This article treats only of prosecution under the provisions of the latter Acts. See TWEED FISHERIES ACTS and POLICE PROSECUTION.

I. *JURISDICTION.*—Under the Summary Jurisdiction Acts, the jurisdiction is deemed to be of a *criminal* nature, not only in prosecutions for crimes and offences at common law, but also in proceedings by virtue of Acts of Parliament, where, in pursuance of, or as part of, a judgment upon a complaint, a Sheriff, Justice of the Peace, or Burgh Magistrate is required or authorised either to pronounce sentence of imprisonment against the respondent, or to grant warrant for his imprisonment for a period limited to a certain time, in default of payment or recovery of a penalty or expenses, or in case of disobedience to an order of the Court. It is deemed to be of a *civil* nature in all other proceedings instituted by way of complaint under the authority of an Act of Parliament (27 & 28 Vict. c. 53, s. 28). These provisions do not affect the right of any party to such proceedings to be examined as a witness therein (*ib.*). The Statutes confer upon the inferior Courts no more extensive jurisdiction than is vested in them at common law or by Act of Parliament (*ib.* s. 27). In determining the bounds of that jurisdiction, the principal factors to be considered (subject to the ordinary rules of law) are: (1) court, (2) territory, (3) gravity of offence, (4) statutory direction, and (5) statutory limitation.

(1) *Court.*—The Summary Jurisdiction Acts apply to certain proceedings (see 3 and 4, *infra*) in the following inferior Courts in Scotland: (*a*) Sheriff; (*b*) Burgh; (*c*) Justice of Peace for County or City, whether in Quarter or Petty Sessions; (*d*) Police (having jurisdiction); and (*e*) Sheriff, Burgh Magistrate, or Justice of Peace exercising jurisdiction under the authority of an Act of Parliament (*ib.* s. 2). The statutory forms may, in certain cases, be varied and adopted in proceedings before Police Courts (*ib.* s. 26).

(2) *Territory.*—In addition to the territorial jurisdiction vested in these several Courts at common law or by Statute, an offender may be tried under the Summary Jurisdiction Acts by any one of two or more of them where: (*a*) the offence is committed in a harbour, river, arm of the sea, tidal or other water, which runs between or forms the boundary of the jurisdiction of two or more Courts; (*b*) the offence is committed on the boundary, or within 500 yards of the boundary, of the jurisdiction of two or more Courts; (*c*) the offence is begun within the jurisdiction of one Court and completed within that of another; (*d*) the offence is committed on any person or in respect of any property, in a vehicle employed in a journey, or on board a vessel employed in a navigable river, lake, canal, or inland navigation, which passes in the course of its journey or voyage through the jurisdiction of more than one Court; and (*e*) the offence is committed in like manner in a vehicle or vessel, which passes in the course of its journey or voyage along a highway, road, river, lake, canal, or inland navigation, of which the side, bank, centre, or other part is the boundary of the jurisdiction of two or

more Courts. The offence is dealt with, heard, and determined as if it had been wholly committed within the jurisdiction of the Court in which it is tried (44 & 45 Vict. c. 33, s. 10).

(3) *Gravity of Offence.*—In a complaint which charges a crime or offence at common law, or a contravention of an Act of Parliament that does *not prescribe* a particular mode of prosecution, the test of jurisdiction is the gravity of the offence measured by the degree of punishment, or amount of penalty, appropriate to it. The Summary Jurisdiction Acts apply in such cases: (*a*) in the *Sheriff Court*, when the offence charged is adequately met by a maximum punishment of imprisonment not exceeding sixty days, or a fine of £10 exclusive of expenses, and, when necessary, an order to find security for good behaviour for six months under a penalty of £20 (9 Geo. IV. c. 29, s. 19; 11 Geo. IV. and 1 Will. IV. c. 37, ss. 4 and 5; 27 & 28 Vict. c. 53, s. 3); (*b*) in the *Sheriff Court*, when the statutory penalty sought to be recovered does not exceed £12 exclusive of expenses and any additional forfeiture (7 Will. IV. and 1 Vict. c. 41; 16 & 17 Vict. c. 80, s. 26; 27 & 28 Vict. c. 53, s. 3; 44 & 45 Vict. c. 33, s. 3); (*c*) in the *Justice of Peace Court* or *Burgh Magistrates' Court*, when the offence charged is adequately met by a maximum punishment of imprisonment not exceeding thirty days, or a fine of £5 exclusive of expenses, and, when necessary, an order to find security for good behaviour for three months under a penalty of £10 (19 & 20 Vict. c. 48, s. 1, partially repealed by Statute Law Revision Act, 1892; 27 & 28 Vict. c. 53, s. 3); and (*d*) in any of these Courts when the prosecutor restricts the statutory punishment to the competent degree, provided that the appropriate punishment for the offence, recognised at common law or fixed by Statute, is not so high as to absolutely exclude summary jurisdiction (*Tague*, 1865, 5 Irv. 192; *Chisholm*, 1871, 2 Coup. 49; *Clark, etc.*, 1886, 1 White, 191).

(4) *Statutory Direction.*—In a complaint which charges a contravention of an Act of Parliament that *prescribes* a particular mode of prosecution, the test of jurisdiction is the statutory direction, irrespective of the degree of punishment or amount of penalty. The Summary Jurisdiction Acts apply in such circumstances in the Courts of Sheriffs, Justices of the Peace, and Burgh Magistrates: (*a*) in proceedings for the prosecution of a person charged with a statutory offence, for which the offender is liable under the Statute to punishment on summary conviction before any of these Courts (27 & 28 Vict. c. 53, s. 3; 44 & 45 Vict. c. 33, s. 3); (*b*) in proceedings for the recovery of a statutory penalty, and any additional forfeiture, directed by the Statute to be recovered by summary complaint or information, or by poinding, distress and sale, or other summary process or diligence, before any of these Courts (*ib.*); (*c*) in proceedings for the prosecution of a statutory offence, or for the recovery of a statutory penalty, and any additional forfeiture, directed by the Statute to be taken summarily, or to be prosecuted or recovered under the Summary Jurisdiction Acts (*ib.*); (*d*) in proceedings of a similar kind directed by the Statute to be taken before a Court of summary jurisdiction or before a Court (*e.g.* Justices of the Peace) whose jurisdiction is exclusively of a summary nature (*Lamb*, 1892, 3 White, 261); (*e*) in proceedings for the trial of a Post-Office offence, either directed by the Act to be tried summarily, or for which the statutory penalty does not exceed £20 (47 & 48 Vict. c. 76, s. 12); (*f*) in Revenue or Customs prosecutions directed by Statute to be tried summarily (44 & 45 Vict. c. 33, s. 11); (*g*) in prosecutions under the Salmon Fisheries (Scotland) Act, 1868, ss. 23 and 24, and in all similar cases, when, in addition to a penalty, a forfeiture is provided by Statute (*ib.* s. 3); and (*h*) at the complainer's option, in prosecutions

under the Tweed Fisheries Acts, and in police prosecutions under general or local Police Acts (*ib.*). But the provisions of the Summary Jurisdiction Acts do *not* extend to: (*a*) a warrant or order for the removal of a poor person who has become chargeable to a parish (27 & 28 Vict. c. 53, s. 25); (*b*) a complaint for the recovery of a rate, tax, or impost (*ib.*); and (*c*) a complaint for the contravention of a Statute which does not authorise summary procedure, and prescribes punishments totally different in character from those comprehended under the Summary Jurisdiction Acts (*Bute*, 1870, 1 Coup. 495; *Nicol*, 1887, 1 White, 416). A statutory penalty or forfeiture may be recovered either by summary procedure or by ordinary action in the Court of Session or Sheriff Court, but not in the Sheriff's Small Debt Court (27 & 28 Vict. c. 53, s. 27).

(5) *Statutory Limitation.*—The Court has no jurisdiction in a complaint for a statutory contravention, unless it has been instituted within the time specially limited by the Act contravened, or, if there is no such special limitation, within six months from the time when the matter of such complaint arose (27 & 28 Vict. c. 53, s. 24; *Laidlaw*, 1866, 5 Irv. 343; *Farquharson*, 1886, 1 White, 26; *Farquharson*, 1894, 1 Adam, 405). If an Act, in creating an offence, directs that a certain period is to elapse before prosecution of an offender, a complaint must not be instituted before the expiry of the statutory period (*Hazzard*, 1873, 2 Coup. 383).

II. *Institution of Proceedings.*—All proceedings under the Summary Jurisdiction Acts are instituted by way of complaint (27 & 28 Vict. c. 53 s. 4). The person at whose instance a complaint is instituted is termed "the complainer," and the person who has to answer to it, "the respondent." See Complaint, Summary. In prosecutions under a few Statutes it is necessary that a complaint shall be made upon oath of the complainer or of a credible witness. The Game (Scotland) Act, 1832, s. 11, although in this respect repealed by the Statute Law Revision Act, 1891, is the most familiar example of such requirement. An oath is indispensable when required by Statute, and has to be emitted by the prescribed person (*M'Neil*, 1842, 1 Broun, 454; *Smith*, 1848, Ark. 508; *Simpson*, 1851, 54 Sc. Jur. 141; *Morris, etc.*, 1867, 5 Irv. 529). The form is statutory (27 & 28 Vict. c. 53, s. 4, and Sched. B). The oath may be sworn before a Justice of the Peace or Burgh Magistrate, although the prosecution is to be before the Sheriff (44 & 45 Vict. c. 33, s. 9 (2)). The complainer, when his complaint is duly completed, lodges it with the Clerk of the Court to which it is addressed. The Clerk obtains the appropriate deliverance (27 & 28 Vict. c. 53, s. 6). Where the complaint prays for a warrant of apprehension, the Court may in its discretion grant a warrant for citation (*ib.*). A warrant to search for, seize, remove, and secure all goods, documents, and other articles mentioned or referred to in the complaint, or to sell game or perishable goods seized and detained, may be added, when competent and prayed for (*ib.*). A warrant to apprehend or to cite may be signed by one Justice of the Peace, although the matter is cognisable by two or more, and such Justice need not be present at the hearing of the complaint (*ib.* s. 21). See Apprehension of a Criminal and Citation on Summary Complaint. Warrant to cite witnesses and havers for both complainer and respondent is included in the deliverance (*ib.* s. 6; *Cockburn*, 1854, 1 Irv. 492). Witnesses should, if possible, be cited at least forty-eight hours before the hearing. The form of citation is statutory (27 & 28 Vict. c. 53, s. 8, and Sched. F (2)), and the execution may be adapted from the style given for citation of the respondent. If the Court is satisfied by evidence on oath that it is probable that a material witness will not attend without compulsion, it

may issue a warrant in the first instance to apprehend and detain him (*ib.* s. 10, and Sched. E (1)). The statutory schedule is limited to the case of a witness for the prosecution.

III. *Hearing and Judgment.*—The procedure at the hearing of a complaint is explained in this division under reference to division IV. The trial must be open to the public (*Finnie*, 1850, 1 J. Shaw, 368). If neither complainer nor respondent appears, the complaint is dismissed. The complainer must be either personally present or competently represented,—a public prosecutor by his duly authorised depute, and a private prosecutor by the law agent who signed his complaint (44 & 45 Vict. c. 33, s. 9 (1)). If the respondent fails to appear, the Court, upon proof that he has been duly cited, may: (*a*) issue a warrant in the second instance for his apprehension (27 & 28 Vict. c. 53, s. 7, and Sched. D (2)); or (*b*) adjourn the hearing to a future date, appointing in its discretion intimation to him (*ib.* and Sched. H (1)); or (*c*) in a statutory charge, where the complaint concludes for a pecuniary penalty only in the first instance, or where the Act founded on authorises procedure without the presence of the respondent, proceed to hear and dispose of the complaint in his absence, without adjourning (*ib.* and Sched. I (2)). In adopting this last alternative, the Court cannot pronounce judgment against the respondent until the complaint has been established to its satisfaction by competent evidence, unless conviction in default of appearance is authorised by the Act contravened (*ib.* s. 15). If the respondent is present, the substance of the complaint is read to him, and he is required to plead (*ib.* s. 14). Before pleading he may state objections to the competency or relevancy of the complaint or proceedings (*ib.* s. 14; *Sangster, etc.*, 1896, 4 S. L. T. No. 209), and, if apprehended, may require an adjournment, as explained in division IV. (1) *infra* (*ib.* s. 11). He may also intimate pleas in bar of trial (see Bar of Trial, Plea in), or make preliminary motions (*e.g.* separation of charges, separation of trials, etc.); but he is not bound to give notice of a special defence (*Howman*, 1891, 3 White, 57). Should he state no objections or pleas and require no adjournment, or if the objections stated are repelled or obviated by amendment or adjournment, or after an adjournment, when one has been allowed,—his plea (if any) is recorded (27 & 28 Vict. c. 53, s. 14). If "guilty," the plea is signed by him, or, when he cannot write, by the judge or Clerk of Court (*ib.*). When he refuses to plead, or pleads ambiguously, a plea of "not guilty" is recorded. On a plea of guilty, the Court may hear a statement in mitigation of sentence, and pronounce judgment (*ib.*). If the plea is "not guilty," the Statute requires no authentication of it, and the complainer may proceed to establish his complaint by such evidence as is competent, the respondent, if he thinks fit, leading evidence in exculpation (*ib.*). The ordinary rules of law govern the proof. Each party, after adducing evidence, declares his case closed. At the conclusion of the whole, each may address the Court, the respondent or his agent being the last speaker (Scots Act, 1672, c. 16, J. C. Reg. 10; *Watson, etc.*, 1878, 4 Coup. 67). While the hearing progresses, the Clerk of Court records the proceedings upon the complaint, and, if necessary, additional sheets attached to it. This record may be in writing, or printed, or partly written and partly printed (27 & 28 Vict. c. 53, s. 17). It must set forth truly what took place at the trial (*Gachie*, 1896, 4 S. L. T. No. 159), and in particular: (*a*) the respondent's plea (if any); (*b*) the names of the witnesses actually examined by both parties; and (*c*) a note of any documentary evidence that may be put in (27 & 28 Vict. c. 53, s. 16, and Sched. I). When an extract of a previous conviction of the respondent is produced, the

contents are noted in the record (50 & 51 Vict. c. 35, s. 67). Preliminary objections and motions, objections to the admission of evidence and to questions put to witnesses, with the manner in which these are disposed of and the grounds of their disposal, and the names of any witnesses tendered for examination and refused by the Court,—may, on the requisition of either party, be entered in the record, such entry being authenticated by the signature of the judge or the Clerk of Court (38 & 39 Vict. c. 62, s. 6; 44 & 45 Vict. c. 33, s. 3). It is not necessary to keep any record of the evidence adduced, except so far as may be required by the Act conferring jurisdiction in the matter of prosecution, or by the Act 38 & 39 Vict. c. 62, s. 6, above mentioned (27 & 28 Vict. c. 53, s. 16; 44 & 45 Vict. c. 33, s. 3; *Penman*, 1845, 2 Broun, 586; *Gardner*, 1865, 5 Irv. 13; *Halliday*, 1867, 5 Irv. 382; *Anderson, etc.*, 1868, 1 Coup. 18; *Bute, etc.*, 1870, 1 Coup. 495). The following is an example of the record:—

At Inverness, the seventh day of August eighteen hundred and ninety-six years, in the presence of *C. D.*, Esquire, Sheriff-Substitute of Inverness-shire, appeared Peter Gow complained against, along with *E. F.*, solicitor, Inverness, as his agent, who objected to the relevancy of the complaint on the ground that it did not specify the lands upon which the respondent was alleged to have gone in pursuit of game; but the Sheriff-Substitute repelled the objection in respect that such specification was not required by the Statute libelled; and the complaint being thereafter read over to the said Peter Gow, he answers that he is not guilty. *C. D.*

Inverness, 7th August 1896.—The Sheriff-Substitute adjourns the diet to the eleventh day of August current, and appoints the said Peter Gow to appear personally on that day, at eleven o'clock forenoon. *C. D.*

At Inverness, the eleventh day of August eighteen hundred and ninety-six years, in the presence of *C. D.*, Esquire, Sheriff-Substitute of Inverness-shire, appeared Peter Gow complained against, along with the said *E. F.* as his agent; and, being again interrogated, he answers that he is not guilty. The witnesses after named were examined in support of the complaint, *videlicet*: Alexander Fraser, police constable, Inverness; William Ferguson, police constable, Inverness; and Algernon Lyon, game dealer, Inverness. The document after mentioned was produced in evidence by the complainer, *videlicet*: Letter written by the said Peter Gow to the said Algernon Lyon, dated 31st July 1896. And the witnesses after named were examined in exculpation, *videlicet*: Thomas Haggerty, labourer, 157 Napier Street, Inverness; and Angus Grant, mason, 159 Napier Street, Inverness. *C. D.*

The evidence and addresses (if any) having been concluded, the Court pronounces judgment at the same or an adjourned diet (27 & 28 Vict. c. 53, s. 14). Except in those cases where procedure in absence is competent under a special Statute, judgment must be pronounced in open Court, and in presence of the respondent (*ib.*; *M'Alister*, 1812, 16 F. C. No. 2 App.); but if this has been done, and a short interlocutor signed, the formal conviction may be drawn up afterwards in his absence (*Hume*, 1846, Ark. 88). In the Justice of Peace Court, when a case is cognisable by two or more Justices, and there is an equal division of opinion among the Justices present, the complaint is held to be not proved, and judgment is given for the respondent (27 & 28 Vict. c. 53, s. 21). See CONVICTION, SUMMARY.

IV. *INCIDENTAL PROCEDURE.*—The general procedure having been described in the preceding division, incidental details will now be more fully explained:—

(1) *Preliminary Motions and Objections.*—A respondent, brought before the Court by a warrant of apprehension, is entitled to require a copy of the complaint, and also that the hearing shall be adjourned for not less than forty-eight hours. Such requisition must be complied with if it is made

before the examination of a witness on the merits has commenced, and if a copy of the complaint has not been delivered to the respondent personally at least forty-eight hours before the hearing (27 & 28 Vict. c. 53, s. 11, and Sched. H, No. 1). The Court, instead of ordaining him to find security to appear, may appoint him to attend the adjourned diet under a suitable penalty (44 & 45 Vict. c. 33, s. 9 (3)). It is the duty of the judge to inform the respondent of this right when the latter is a child, or an illiterate person, is charged with a serious crime, or pleads not guilty and asks delay (*Pyper*, 1885, 5 Coup. 631; *Grant*, 1889, 2 White, 261; *Gardiner*, 1890, 2 White, 474; *Boyce*, 1891, 3 White, 73). For the usual preliminary objections and motions, see *supra*, p. 382. No objection to the complaint can be allowed by the Court for any alleged defect therein in substance or in form, or for any variance between the complaint and the evidence adduced on the part of the prosecutor, not changing the character of the offence charged (27 & 28 Vict. c. 53, s. 5); but if a complaint is irrelevant at common law, or under the Statute upon which it is founded, the Court has no jurisdiction to try it, and the proceedings are bad *ab initio* (*Buist*, 1865, 5 Irv. 210; *Crosbie*, 1866, 4 M. 803; *Hendry*, 1889, 2 White, 380; *Hastie*, 1894, 1 Adam, 505). Relevancy can only be argued upon the terms of the complaint as instituted (*Howman*, 1891, 2 White, 617).

(2) *Amendment of Complaint.*—If an objection is taken to the complaint in respect of a defect therein in substance or in form, or of any variance between it and the evidence adduced, which neither changes the character of the offence nor appears to the Court to have deceived or misled the respondent, the objection must be repelled (27 & 28 Vict. c. 53, s. 5). If, however, the defect or variance appears to the Court to be such that the respondent has been thereby deceived or misled, the Court may adjourn the hearing, and at the same time, or at any stage of the proceedings, direct such amendment to be made upon the complaint as may be requisite (*ib.*). No amendment can be made which either changes the character of the offence charged (*ib.*); or obviates objections to the competency or relevancy of the complaint or proceedings, which would render the former radically defective and the latter bad *ab initio* (*Mitchell*, 1863, 4 Irv. 257; *Buist*, 1865, 5 Irv. 210; *Crosbie*, 1866, 4 M. 803; *Stevenson*, 1879, 4 Coup. 196; *Mathieson*, 1885, 5 Coup. 582; *Macintosh*, 1886, 1 White, 218; *Lundie*, 1894, 1 Adam, 342; *Hastie*, 1894, 1 Adam, 505; and *Jameson*, 1896, 4 S. L. T. No. 57). An amendment, when allowed, ought to be made upon the principal complaint at once and at the sight of parties. It is authenticated by the signature or initials of the judge or the Clerk of Court (27 & 28 Vict. c. 53, s. 5). See AMENDMENT OF THE LIBEL.

(3) *Abandonment of Proceedings.*—If the complainer desires to abandon the proceedings, he may ask leave of the Court to withdraw the complaint (*Bole*, 1883, 5 Coup. 350; *Gallacher*, 1886, 1 White, 130); or he may move the Court to desert the diet either *pro loco et tempore* or *simpliciter*, *e.g.*:—

Inverness, 26th August 1896.—The complainer respectfully moves the Court to desert the diet *pro loco et tempore*. *A. B., P.-F.*

Inverness, 26th August 1896.—The Sheriff-Substitute, in respect of the foregoing minute, deserts the diet *pro loco et tempore*. *C. D.*

This step puts an end to the original complaint and warrant; and if there are to be further proceedings, a fresh complaint must be prepared and a new warrant obtained (*Collins*, 1887, 1 White, 482). Renewed proceedings

cannot be instituted if the examination of a witness on the merits in the first complaint had been begun before the diet was deserted. See DIET, DESERTION OF.

(4) *Adjournment of Hearing.*—Except on the requisition of a respondent apprehended (*vide* IV. (1) *supra*), no adjournment takes place unless the Court thinks fit to order it (27 & 28 Vict. c. 53, s. 12; *Robertson*, 1869, 1 Coup. 348; *Haining*, 1893, 1 Adam, 86). A motion for adjournment is an appeal to the discretion of the Court, and may be granted on any ground which the Court thinks reasonable and proper, or may be refused (*Bruce*, 1861, 24 D. 184; *Carruthers, etc.*, 1867, 5 Irv. 398; *Dunsmore*, 1896, 4 S. L. T. No. 207). In particular, the diet may be adjourned when an objection has been taken to the complaint in respect of a defect or variance which appears to the Court to have deceived or misled the respondent (27 & 28 Vict. c. 53, s. 5). An adjournment should be offered in all cases where a material alteration of the complaint is allowed (*Jackson*, 1867, 5 Irv. 409; *Matheson*, 1885, 5 Coup. 582). Every adjournment must be to a specified place and date, and noted in the record by a valid minute signed by the judge, except when the Court rises for a short interval, to resume the same day (27 & 28 Vict. c. 53, s. 5, and Sched. H; *Frasers*, 1852, 1 Irv. 1; *M'Intyre*, 1876, 3 Coup. 298; *Armour*, 1886, 1 White, 58; *M'Lean*, 1895, 1 Adam, 564; *M'Arthur*, 1896, 2 Adam, 151). One Justice of the Peace, without the presence or concurrence of others, may adjourn the Court (27 & 28 Vict. c. 53, ss. 12 and 21; *Carruthers*, 1867, 5 Irv. 398). In the event of an adjournment being granted, no further notice of the adjourned diet is given to the parties and witnesses, if they are present; but if the respondent is absent, the Court may in its discretion appoint intimation to be made to him (*ib.* s. 7). If the hearing is adjourned when the respondent has been brought into Court upon a warrant of apprehension, warrant may be granted to detain him in prison until the period to which the hearing is adjourned, or until he finds sufficient caution to appear at all future diets of the Court (*ib.* s. 12, and Sched. H, No. 2); but if the adjournment is granted upon his requisition, the Court may simply appoint him to attend, under a suitable penalty (44 & 45 Vict. c. 33, s. 9 (3)).

(5) *Witnesses.*—If a person cited as a witness by a warrant neglects or refuses to appear, and no just excuse is offered on his behalf, the Court may issue a warrant for his apprehension (*ib.* s. 10, and Sched. E (2)); and it may also summarily punish for contempt, by imprisonment or fine (such punishment not exceeding what it would be entitled to award in case of conviction upon the complaint), any witness who wilfully fails to attend after being duly cited, refuses to be sworn or examined on affirmation, or refuses to answer a question or produce a document allowed or required by the Court (*ib.* s. 10). A separate complaint may be instituted, in the judicatory before which he was cited, for the prosecution of an absent witness (*Petrie*, 1889, 2 White, 358).

V. *APPEAL.*—No conviction or judgment, in pursuance of the Summary Jurisdiction Acts, can be quashed for want of form, and no warrant of imprisonment, warrant for poinding and sale, or extract judgment, is held void by reason of any defect of form therein, provided it is therein mentioned, or may be inferred therefrom, that it is founded, or has proceeded on, a conviction, and there is a valid conviction to sustain it (27 & 28 Vict. c. 53, s. 34). See ADVOCATION; APPEAL TO HIGH COURT OF JUSTICIARY; APPEAL TO CIRCUIT COURT; APPEAL TO QUARTER SESSIONS; EXCHEQUER COURT; and SUSPENSION.

VI. *Execution of Sentence.*—Execution may proceed either upon the judgment or warrant itself, or upon an extract issued as nearly as may be in the form of Schedule K, No. 9, and signed by the Clerk of Court (27 & 28 Vict. c. 53, s. 18). The judgment may be enforced without the authority or concurrence of the prosecutor in the original complaint (*Morton*, 1867, 5 Irv. 356). The presence of the respondent is not necessary after conviction, when any further warrant has to be obtained or procedure taken; and the forms in Schedule K may be adapted to suit such warrants or procedure (27 & 28 Vict. c. 53, s. 20). Warrants after conviction in the Justice of Peace Court may be signed by one Justice, who need not have been present at the hearing of the complaint (*ib.* s. 21). When the judgment authorises execution by arrestment, poinding and sale, and imprisonment, the warrant of imprisonment, in default of payment or recovery, cannot be enforced until after the expiration of the period allowed for execution (*ib.* s. 18 (6), and Sched. K, No. 6). A warrant of arrestment, or of poinding and sale, must be executed by an officer of Court (*ib.*) The latter warrant is executed in the manner provided by the Small Debt (Scotland) Acts, 1837 to 1889 (7 Will. IV. and 1 Vict. c. 41; 16 & 17 Vict. c. 80; 52 & 53 Vict. c. 26); provided that, in place of the customary notice of sale, every sale has to be advertised in some newspaper circulating in the place of sale on the day of sale, or within three days preceding (44 & 45 Vict. c. 33, s. 8 (2)). No sale is to be made unless the goods are, at the appraised value, sufficient to satisfy the sums decerned for and the expenses of the poinding and sale (27 & 28 Vict. c. 53, s. 19). If the officer is unable to find sufficient goods, he reports to the Court in a statutory form, and warrant of imprisonment in terms of the conviction is obtained and executed (*ib.* Sched. K, Nos. 4, 5, and 6; 44 & 45 Vict. c. 33, s. 8 (1)). A sentence or decree for a pecuniary penalty or expenses may be enforced beyond the jurisdiction of the Court which pronounced it, after endorsation at the place of execution, where it may be executed by an officer either of the issuing or endorsing jurisdiction (11 Geo. IV. and 1 Will. IV. c. 37, s. 8; 27 & 28 Vict. c. 53, s. 9). A Sheriff's warrant is endorsed by a Sheriff Clerk, and that of any other Court by a magistrate having jurisdiction, who adds his official designation, *e.g.* "One of Her Majesty's Justices of the Peace for the County of Perth."

[Spens, *Jurisdiction and Punishments of Summary Criminal Courts*, 1875; Moncreiff, *Review in Criminal Cases*, 1877; Renton, *Procedure and Appeal in Summary Criminal Cases*, 1890; Macdonald, *Practical Treatise on the Criminal Law of Scotland*, 1894; Chisholm, *Barclay's Justice's Digest*, 1894; Brown, *Principles of Summary Criminal Jurisdiction*, 1895.]

Criminal Responsibility.—See Jurisdiction (Criminal); Age; Crime (*Nonage*); Insanity.

Croft—Crofters' Holdings (Scotland) Acts, 1886, 1887, and 1888 (49 & 50 Vict. c. 29; 50 & 51 Vict. c. 24; 51 & 52 Vict. c. 63).

Application of Acts.

The Acts apply (s. 19) to such portions of the seven counties of Argyll, Inverness, Ross, Cromarty, Sutherland, Caithness, and Orkney and Shetland, as the "Crofters Commission," created by the Act, shall determine to be

crofting parishes or aggregates of crofting parishes; and one of the first duties of the Commission was to ascertain and define these districts. In the result, nearly all the parishes in the counties named have been found to be crofting parishes.

A crofter is (s. 34) "any person who, at the passing of the Act, is tenant of a holding" (being arable or pasture land other than garden ground) "from year to year, who resides on his holding (see *Livingstone*, 1891, 18 R. 735, as to what constitutes residence), the annual rent of which does not exceed thirty pounds in money, and which is situated in a crofting parish, and the successors of such person in the holding being his heirs or legatees."

A crofting parish (s. 34) is one in which there are crofters, and in which the crofters have, within the last eighty years, had holdings consisting of arable land, with a right of pasturage in common with one another.

The Act contains certain provisions in favour of a class other than the crofters, who are termed "cottars." A cottar (s. 34) is either "the occupier of a dwelling-house situate in a crofting parish, with or without land, who pays no rent to the landlord"; or "the tenant from year to year of a dwelling-house, situated in a crofting parish, who resides therein, and who pays to landlord therefor an annual rent not exceeding six pounds in money, whether with or without garden ground, but without arable or pasture land."

The former class of cottars are simply squatters who have settled down and built themselves houses on mere tolerance by the landlord. The latter class are those who are tenants of houses without land.

It will be observed that, whilst the Act applies to all cottars, it applies to those crofters only and their successors in title who are in possession of holdings at the date of the passing of the Act. A tenant who takes a new holding subsequent to the passing of the Act is not a crofter within the meaning of the Act, and can claim no benefit under the Act.

It often happens that a number of crofts are let along with a large farm, and the crofters pay their rent not to the proprietor, but to the principal tenant or middleman. These crofters do not enjoy the benefit of the Act (*Livingstone*, 1891, 18 R. 735; *Dalgleish*, 1895, 22 R. 646).

Security of Tenure.

The Act (s. 1) gives to the crofter a perpetual tenure, subject to the fulfilment of certain conditions (s. 7), and defeasible at any time in the option of the crofter on his giving one year's notice to the landlord. So long as the necessary conditions are fulfilled, the landlord cannot remove the crofter from the holding. These conditions are, that the crofter shall not—

(1) Fail to pay his rent.
(2) Attempt to assign his tenancy.
(3) Persistently cause dilapidation of buildings, or deterioration of soil.
(4) Subdivide (see *Abinger*, 1888, 15 R. 598) or sublet his holding, or erect additional dwelling-houses thereon, without the landlord's consent.
(5) Persistently violate any reasonable written agreement with reference to the holding.
(6) Become notour bankrupt, or grant a trust deed for behoof of creditors (the right to the tenancy does not pass to the trustee in bankruptcy—*M'Kenzie*, 1894, 22 R. 45).
(7) Obstruct the landlord in the exercise of any of the proprietary rights specially reserved to him by the Statute.

(8) Open a public-house on his holding without the consent of the landlord.

Notwithstanding fulfilment of the foregoing conditions, the crofter may (s. 2) be removed from the whole or a part of his holding on such terms as to compensation as the Crofters Commission shall fix, if the landlord satisfy the Commission that he desires to resume the whole or part of the holding for some reasonable purpose, having relation to the good of the holding or of the estate.

The crofter cannot be removed for non-payment of rent until one year's rent is due (s. 3). In that case he is liable to be removed in the manner provided by sec. 27 of the Agricultural Holdings (Scotland) Act, 1883, viz.: By an action of removing before the Sheriff against the crofter, concluding for his removal from the holding at the term of Whitsunday or Martinmas next ensuing after the action is brought. This irritancy may be purged by payment of the rent, or by finding caution for it and for one year's rent further.

When two years' rent of the holding is due and unpaid, or when the crofter has broken any other of the statutory conditions, he is liable to be removed in the manner provided by sec. 4 of the Act of Sederunt of 14th December 1756, viz.: By an action for declarator of irritancy and summary removing before the Sheriff. This irritancy can be purged only by payment of the arrears in full, when the failure in payment of rent is the ground of action. In the other cases, being analogous to a conventional irritancy in a lease, the irritancy cannot, it is thought, be purged at all.

Fair Rent.

The rent (s. 4) annually payable by the crofter, under the permanent tenure conferred upon him by the Act, is to be the same as the rent payable by him for the year from Whitsunday 1886 to Whitsunday 1887. This rent may, however, be altered in the future in either of two ways: (1) The landlord and the crofter may voluntarily agree to alter the amount of the rent (s. 5). (2) Either the landlord or the crofter may apply to the Commission to fix the "fair rent" to be paid by the crofter for the holding (s. 6).

In fixing the amount of the fair rent, the Commission are to take into account all the circumstances of the case, holding, and district, and particularly any permanent or unexhausted improvements on the holding, and suitable thereto, which have been executed or paid for by the crofter or his predecessors of the same family.

The rent fixed by the Commission is to be the rent payable by the crofter as from the first term of Whitsunday or Martinmas after the date when the rent is fixed (s. 6, subsecs. 2 and 3); but in case the fair rent fixed by the Commission is less than the rent the crofter has hitherto paid, the reduction is to draw back to the date of the notice of application to fix the fair rent.

When an application to fix a fair rent has been presented to the Commission, they may (s. 6, subs. 4) pronounce an order which will have the effect of sisting proceedings depending in any Court for the removal of the crofter for non-payment of rent until the application is finally determined, and that upon such terms as to payment of rent or otherwise as they shall think fit. The Commission are also empowered (50 & 51 Vict. c. 24, s. 2) to prohibit the sale of the crofter's effects under proceedings for recovery of rent, until the application to fix a fair rent has been disposed of.

Arrears.

The provision above noticed with reference to the sisting of an action of removal for non-payment of rent is explained by the succeeding one (s. 6, subs. 5), which gives to the Commission absolute powers of dealing with the arrears upon any holding for which they are called to fix a fair rent. After considering the whole circumstances of the case, the Commission may either wipe out all the arrears, or reduce them, or determine that they shall be paid in full; and they may direct whether they are to be paid in one payment or by instalments, and the date or dates at which they shall be paid. The jurisdiction of the Courts of law to grant decree for arrears is not suspended by this provision (*Fraser*, 1886, 14 R. 181).

Succession and Bequest.

It is implied in the interpretation of the word "crofter" (s. 34), that in default of bequest the right to the permanent tenancy of the holding at a fair rent created by the Statute is to descend to the crofter's heir-at-law (s. 19). In the event of the heirs-at-law being heirs-portioners, the eldest is to succeed without division. By the Agricultural Holdings Act, power was given to the tenant to bequeath his lease. A similar power (s. 16) is conferred upon the crofter with reference to the right to his holding. The privilege conferred upon the crofter is more limited, however, than that given to the agricultural tenant, for the crofter can bequeath his tenancy only to a member of his own family; "that is, his wife or any person who, failing nearer heirs, would succeed to him in case of intestacy" (see *M'Lean*, 1891, 18 R. 885, and *Mackenzie*, 1894, 21 R. 427). The other provisions with reference to this matter are similar to those contained in the Agricultural Holdings Act. As security against having an objectionable crofter thrust upon him, an opportunity is to be afforded to the landlord to state before the Sheriff any objection he may entertain against receiving the legatee as a crofter; and in the event of the Sheriff, whose decision in the matter is final (see *Mackenzie*, 1894, 21 R. 427), being satisfied that the objection is a reasonable one, the bequest is to be null. The decision whether a ground of objection is reasonable is one in which the Sheriff must exercise a fair discretion. Where the right to the holding descends by succession or bequest to a relative more remote than a brother or a grandson of the deceased, the landlord may represent to the Sheriff that the holding ought to be used for the purpose of enlarging the holdings of neighbouring crofters; and in case the Sheriff shall so determine, the succession or bequest is to lapse, the heir or legatee being entitled, however, to compensation for unexhausted improvements on the holding. Power is given to the Commission to enforce the allocation of land so taken from the heir or legatee among the neighbouring crofters, should the landlord fail to carry this into effect himself.

Nature of Crofter's Tenure.

The right conferred upon the crofter by the provisions above explained is declared (s. 19) to be equivalent to a lease. In reality, however, the right is one altogether *sui generis* and new to our law, containing elements and conditions incompatible with the contract of lease or of feu, or any other contract known to our law (see *MacDonald*, 1894, 21 R. 900, where it was held that crofters are not heritors, or as such entitled to call upon neighbours to concur in erecting march fences). The crofter and his heirs are to have a permanent right to the agricultural use of the holding,

defeasible at any time at the crofter's pleasure, and subject to certain statutory irritancies, but without power of alienation *inter vivos*, or *mortis causa*, save to members of testator's own family, or of division or subletting, and the rent is to be fixed, in default of agreement, every seven years by a statutory public tribunal.

Compensation for Permanent Improvements.

On his renunciation of tenancy or removal from his holding, the crofter is to be entitled (s. 8) to compensation for any permanent improvements suitable to the holding, and executed or paid for by himself or his predecessors of the same family whilst under no written obligation to the landlord to make them. "Permanent improvements" are enumerated in the Schedule to the Act. They include most of the improvements enumerated in Parts I. and II. of the Schedule to the Agricultural Holdings Act. Under the latter Act, in order to entitle the tenant to compensation for improvements enumerated in Part I. of the Schedule thereto, the written consent of the landlord to the execution of the improvement is necessary, whilst the improvement specified in Part II. requires certain notices to found a claim. The necessity alike for the consents and the notices is superseded by the more general provisions of the present Act.

A similar privilege in regard to compensation for permanent improvements is provided (s. 9) to cottars who pay rent, but the cottar who pays no rent is to be entitled to compensation only when he is removed by the landlord, not when he himself removes voluntarily.

Improvements are to be valued (s. 10) at such sum as represents their value to an incoming tenant, under deduction of the value of any assistance or consideration allowed by the landlord to the crofter for making the improvement, and of any deteriorations permitted or committed by the tenant during the last four years.

The Act makes no provision for the ascertainment of the amount of compensation to be awarded under these sections. It is provided (s. 31) that where compensation for improvements is sought under the Agricultural Holdings Act, the improvements are to be valued by the Crofters Commission, unless the parties otherwise agree. The last item in the enumeration of permanent improvements in the Schedule is: "All other improvements which, in the judgment of the Crofters Commission, shall add to the value of the holding to an incoming tenant." From these two indications, it may perhaps be gathered that it was intended that the amount of compensation for permanent improvements under this Act should be ascertained by the Crofters Commission. But that has not been so provided; and as the Commission are a statutory body with strictly defined powers and duties, it is incompetent for them, save of consent, to entertain any claim for compensation for improvements under secs. 8–10 of this Act. The claimant must therefore have recourse to the ordinary Courts of law, which again must remit to the Crofters Commission in case any claim is made under the last item in the Schedule. The notices of claim prescribed by the Agricultural Holdings Act are not here necessary, but these notices are still required when a claim is made by a crofter under the latter Act.

Enlargement of Holdings.

The Commission is empowered, at any time within five years from the passing of the Act, to assign available land to crofters for the enlargement of their holdings (ss. 11, 12, 13, 14, 15, 21, and 22). It is provided that any five or more crofters resident on neighbouring holdings, in case the

landlord or landlords refuse to let them available land which they are willing to take on reasonable terms for enlarging their holdings, may apply to the Commission, setting forth these facts. In considering this application, the Commission is to ascertain where the responsibility for the small size of the holdings rests, and to give such effect to the result of that inquiry as to them seems proper. In some cases, crofters have been deprived of their grazing grounds within recent memory; in other cases, the small size of the present holdings is due to subdivision and overcrowding upon the part of the crofters themselves, often in disregard of estate regulations.

Before giving additional land to the crofters, the Commission must be satisfied (s. 12)—

(1) That there is available land which the landlord refuses to give on reasonable terms; and in considering what are reasonable terms, the Commission is not to have regard to the fact that the landlord might get more than the agricultural value by letting the land for sporting purposes.

(2) That the applicants are willing and able to pay a fair rent, and properly to stock and cultivate the holding.

On being satisfied on those points, the Commission may make an order which will have the effect of adding additional land to the holdings of the applicants, or of one or more of them, at a fair rent, and upon such terms and conditions as the Commission shall consider just.

Land is not to be deemed available for the purpose of enlarging crofters' holdings under the Act (s. 13) which—

(1) Does not lie contiguous or near to the holdings of the crofters making application, or does not belong to the landlord or landlords of these crofters.

(2) Is subject to a lease for a term of years entered into before the commencement of the Act (not being a lease for sporting purposes), unless the landlord and the tenant of the land both consent to its assignment to the crofters.

(3) Forms part of any garden, policy, park, or wood.

(4) Forms part of any farm, unless the annual value of the same is above £100, and the Commission are satisfied that no damage will be done to the letting value of the remainder by assigning a part to the crofters, which part so assigned must not, however, exceed a certain prescribed proportion of the value of the whole farm.

(5) Is arable land or improved pasture in the immediate vicinity of a residence or farm-steading, or which cannot be taken without substantially impairing the amenity of such residence or farm-steading.

(6) Is let as a deer forest, and the appropriation of which to the use of the crofters would seriously impair the use of the remainder as a deer forest, and act injuriously upon the prosperity of the inhabitants of the district.

The Act makes no provision for the adjustment of the relations of landlord and tenant where part of a farm under an existing lease is assigned to crofters (see *Traill's Trs.*, 1890, 17 R. 1115).

The Commission are not to entertain an application for the enlargement of holdings to the effect of raising the annual value of the applicants' holdings to a higher amount than £15 each (subs. 5).

Instead of giving to each crofter applicant a bit of additional land for

himself, the Commission may (s. 12) assign to a body of crofters a piece of land with rights of common pasturage among themselves. The Commission may also, in dealing with applications for the enlargement of holdings, admit the applicants to a share of rights of common pasturage enjoyed by other crofters. In these cases it is thought no crofter can get a more valuable right of pasturage than will raise the annual value of his tenancy above £15 *per annum*.

Where land is assigned by the Commission for the enlargement of crofters' holdings, the Commission may (s. 21) make such orders and directions as to the erection and maintenance of the fencing of this land, and the cost of the same, as they shall think just, regard being had to the advantage accruing to the several parties interested from the fencing of the land.

In the event of the land taken for the enlargement of crofters' holdings being let on lease at the time for sporting purposes, the Commission are (s. 14) to determine what reduction of rent, if any, the sporting tenant is to receive in respect of the appropriation of the land for crofting purposes; but there is no corresponding provision for the case where land let on an agricultural lease, entered into subsequent to the passing of the Act, is taken for the enlargement of crofters' holdings.

The Crofters Commission.

Provision is made (s. 17) for the appointment of a Commission for the administration of the Act, consisting of three members, of whom one must be able to speak the Gaelic language, and one must be a member of the Scottish bar of not less than ten years' standing. The Commission, subject to the direction of the Secretary for Scotland, are to hold sittings in the districts to which the Act applies, and they are empowered to appoint officers, including valuers, assessors, clerks, and other subordinates, for their assistance in the due administration of the Act.

Powers and Duties of Commission.

The following is a summary of the matters intrusted to the Commission by the Statute, and the powers conferred upon them:—

The determination whether any written condition signed by the crofter for the protection of the interest of the landlord or of neighbouring crofters is reasonable (s. 1).

The authorisation of the resumption of crofters' holdings by the landlord, and the determination of the conditions of the same (s. 2).

The fixing of the fair rent (s. 6).

The sisting of proceedings for removal of crofter, or sale of his effects, pending the determination of the fair rent (*ib.* and s. 2 of Act of 1887).

The determination of all questions with reference to arrears (*ib.*).

The enlargement of crofters' holdings (s. 12).

The allocation of pasturage among crofters (*ib.*).

The preparation of scheme regulating the use by crofters of seaweed, peat, and thatching materials (*ib.*).

The determination of the amount of deduction of rent to be allowed to sporting tenant in case land is taken for the enlargement of crofters' holdings (s. 14).

The assignation of holding to neighbouring crofters where succession or bequest annulled by Sheriff for that purpose, and landlord fails to carry it out (s. 16).

The appointment of their own officials (s. 17).
The preparation of an annual report to the Secretary for Scotland (s. 18).
The determination of the areas to be covered by the Act (s. 19).
The appointment, where necessary, of assessors and valuers (ss. 20 and 21).
The appointment of time and place of hearings, and intimation of same to parties interested (*ib.*).
The inspection of the holding or district (*ib.*)
The making of orders with reference to the fencing of land given to crofters, and the expense of the same (s. 21).
The summary settlement of the boundaries of crofters' holdings and grazings (*ib.*).
The summary settlement of any dispute as to whether a person is a crofter (*ib.*).
The delegation of their duties to one or more of their number (s. 23 as amended).
The taking of evidence on oath (s. 24).
The determination of all questions of expenses of proceedings before them (*ib.*).
The use of Sheriff Courts and the services of Sheriff Court officials (s. 26).
The transmission to the Sheriff Clerk of all orders pronounced by them, with relative applications (s. 27).
The preparation and issue of forms of application and other forms of procedure (s. 29).
The preparation of rules of procedure and of a scale of costs (*ib.*).
The valuation of improvements under the Agricultural Holdings Act (s. 31).
The determination whether improvements other than those enumerated have added to the value of the holding (Schedule).

The decision of the Commission upon all matters committed to their determination by the Act is final (s. 25. But see *Dalgleish*, 1895, 22 R. 646). But the question whether any matter at issue is one which has been committed to the Commission by the Act, and which is therefore within their competence, is one which can be carried to a Court of law. A party who thinks that the Commission are exceeding their powers, may stay their proceedings by an interdict, or reduce their finding.

Procedure.

The Commission are authorised (s. 29) to make rules for procedure before themselves, and to frame and issue such printed forms of application and other forms of procedure as they shall think proper. They are further empowered to prepare a scale of costs and fees, and to make regulations as to the payment of the same. Rules and forms and a scale of costs and fees have accordingly been prepared and issued by the Commissioners.

The Commission may (51 & 52 Vict. c. 63, s. 1) delegate their powers to one or more of their number, assisted by two valuers or assessors, but any decision of the Court so sitting is subject to review upon appeal to the whole Commission.

All applications to the Commission are to be addressed (s. 27) to the Crofters Commission at the office of the Sheriff Clerk or Sheriff Clerk-Depute of the county or district, by whom they are to be forwarded to the Commission.

Provision is made (ss. 20 and 21) for the intimation by the Commissioners to the parties interested of all applications to fix a fair rent, or for the enlargement of crofters' holdings (see *Dalgleish*, 1895, 22 R. 646). The time and place of hearing are to be fixed by the Commission and notified to the parties. In dealing with such applications, the Commission may visit the place to which the application relates, and they may appoint assessors or valuers, specially qualified by local knowledge or otherwise, to assist them in the determination of any cause.

The Commission are empowered (s. 26) to use the Sheriff Court rooms when these are not required by the Sheriffs, and they are entitled to the services of the officers of these Courts.

Questions with reference to the boundaries of crofts and crofters' grazings, and any dispute as to whether a person is a crofter within the meaning of the Act, may be determined summarily by the Commission (s. 21).

Evidence before the Commission may be taken on oath on the demand of either party (s. 24). No power is given to the Commission to compel the attendance of witnesses: and should this be necessary, application must be made to a Court of law for the purpose.

The Commission are empowered (s. 24) to determine all questions of expenses of proceedings before them.

Orders of the Commission, with the applications upon which they proceed, and other proceedings which in the opinion of the Commission ought to be recorded, are to (s. 27) be forwarded by the Commission to the Sheriff Clerk or Sheriff Clerk Depute of the county or district, to be recorded in a book to be kept by him, called the "Crofters' Holding Book."

The Commission, not being a Court of law, have no power directly to enforce their own orders. But any order of the Commission, or two of their number, acting as above explained, may (s. 28) be presented to the Sheriff, who, if satisfied that the procedure before the Commission has been in conformity with the provisions of the Act, and that the order has been duly recorded in the Crofters' Holding Book, may pronounce decree in conformity with such order, upon which execution and diligence shall proceed. This duty of the Sheriff is ministerial, and there is no appeal (*Argyll*, 1888, 16 R. 139).

Holdings excepted from Provisions of Acts.

The provisions of the Act are not to apply to any holding or building let to any employee of the landlord or of his tenant during the continuance of the employment (s. 33). There is a similar provision in the Agricultural Holdings Act. A further exception is made by the present Statute of all holdings or buildings let, at a nominal rent or without rent, as a pension to old servants, or on account of old age or poverty. Finally, the Act is not to apply to holdings or buildings let to such officials as clergymen or schoolmasters during their tenure of office, or to any innkeeper or tradesman placed in the district by the landlord for the benefit of the neighbourhood.

[Johnston, *Crofters' Holdings Acts*: Rankine on *Leases*].

Supplemental Notes.

Law Books published by

Black's Parochial Law. A Handbook of Scottish Parochial Law, other than Ecclesiastical. By Wm. Geo. Black. Crown 8vo. 8s.

Graham Murray's Registration Cases. Qualification of Voters and Revised Edition of the Solicitor-General's Digest of Registration Cases. By Robert L. Blackburn, Advocate. 5s.

Currie's Confirmation of Executors. The Confirmation of Executors in Scotland, according to the Practice in the Commissariot of Edinburgh, with Appendices of Forms, &c. By James G. Currie. Second Edition. 8vo. 14s.

—— With Supplement on Finance Acts, 1894 and 1896. 18s. 1897.

Mackay's Practice. The Practice of the Court of Session. By Æ. J. G. Mackay, Advocate. Two volumes, royal 8vo. £3, 12s.

Murray's Notaries Public. The Law Relating to Notaries Public, with Forms of Instruments. By J. C. Murray. 8vo. 12s.

Campbell's Mercantile Law. Principles of Mercantile Law in the Subjects of Bankruptcy, Cautionary Obligations, Securities over Moveables, Principal and Agent, Partnership, and the Companies Acts. By R. Vary Campbell, Advocate. Second Edition, revised and enlarged. 8vo. 12s.

Trayner's Maxims. Latin Maxims and Phrases. Collected from the Institutional Writers on the Law of Scotland and other Sources. By John Trayner, one of the Senators of the College of Justice. Fourth Edition. 8vo. 21s. 1894.

Ferguson's Railway Law. A Summary of the Law relating to a Railway in Operation. By James Ferguson, Advocate. 8vo. 18s.

Ferguson's Five Years' Railway Cases, 1889–1893, with Acts of Parliament and of Sederunt; and the Railway and Canal Commission Rules. Demy 8vo. 5s. *nett.* 1894. Being a Supplement to the above work.

Both Treatises may be had bound in 1 vol., at 21s. *nett.*

Balfour's Court of Session Practice. A Handbook of Court of Session Practice for the use of Students. Second Edition, revised by Robert Berry. 8vo. 12s.

Macdonald's Criminal Law. A Practical Treatise on the Criminal Law of Scotland. By J. H. A. Macdonald, Q.C. (Lord Justice-Clerk). Third Edition, greatly enlarged. 8vo. £1, 11s. 6d. 1894.

Kirkpatrick on Evidence. A Digest of the Scottish Law of Evidence. By John Kirkpatrick, M.A., LL.B., Advocate. Second Edition, revised and enlarged. Crown 8vo. 8s.

William Green & Sons.

M'Kechnie and Lyell's Court of Session Styles: Being Forms of Summonses, Notes of Suspension, Petitions, &c. Compiled by D. M'Kechnie, M.A., and W. D. Lyell, M.A., Advocates. 8vo. 16s.

Mackenzie on Cessio. Manual of the Law of Cessio. With an Appendix containing the Statutory Provisions and Forms for all matters occurring in the Process of Cessio. By A. Mackenzie, Solicitor. 8vo. 5s.

Seton's Registration Acts. A Practical Analysis of the Acts relating to the Registration of Births, Deaths, and Marriages in Scotland, with Statutes, Forms, Tables, &c. By George Seton, Advocate. Fifth Edition. 8vo. 7s. 6d. *nett.*

Burns on Conveyancing. A Handbook of Conveyancing, for the use of Students. By John Burns, B.L. 6s.

Lorimer's Joint-Stock Companies. An Outline of the Law of Joint-Stock Companies. By J. Campbell Lorimer, LL.B., Advocate. Crown 8vo. 5s.

Report of the Trial of the Dynamitards before the High Court of Justiciary, at Edinburgh, December, 1883, for Treason-Felony. By C. T. Couper, Advocate. 8vo. 9s. 1884.

Moncreiff on Review. A Treatise on the Law of Review in Criminal Cases by the High Court and Circuit Court of Justiciary, and on Procedure in Criminal Cases in Inferior Courts in Scotland. By Hon. H. J. Moncreiff (Lord Wellwood). 8vo. 15s.

Lorimer's Studies, National and International. Occasional Lectures delivered in the University of Edinburgh, 1864–1889. By the late James Lorimer, Professor of Public Law, University of Edinburgh. 10s. 6d.

Styles of Writs in the Sheriff Courts of Scotland. By James Forrest, Advocate, and R. B. Shearer, Writer, Greenock. 8vo. 12s.

Scottish Chamber of Agriculture Series. The Agricultural Holdings (Scotland) Act, 1883. By Professor Rankine. 2s. *nett.* 1894. The Farmer's Legal Handbook. By Isaac Connell, Solicitor. Crown 8vo. 3s. 6d. *nett.* 1894. The Law of Entail: A Lecture. By Professor Wood. Crown 8vo. 6d. 1894.

Manual of the Law of Scotland, specially for the Use of Students. By William Kinniburgh Morton, S.S.C. One Large Volume. 12s. *nett.* 1896.

Guide to Local Government in Counties, Parishes, and Burghs, containing the Text of all Acts dealing with County and Parish Councils and their Duties. Fourth Edition. 7s. 6d. *nett.* 1898.